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Fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties

by Georg Nolte, Special Rapporteur*

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I. Introduction

1. In 2012, the Commission placed the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" on its current programme of work.[1] The topic originated in the prior work of the Commission's Study Group on treaties over time.[2]

2. From the sixty-fifth to the sixty-eighth sessions (2013–2016), the Commission considered four reports by the Special Rapporteur[3] and provisionally adopted, on first reading, a full set of 13 draft conclusions on the topic, with commentaries thereto.[4]

3. At the sixty-eighth session (2016), the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018.[5] As of the date of the submission of the present report, responses have been received from 12 States.[6]

4. The purpose of the present report is to provide a basis for the second reading of the draft conclusions by the Commission. In accordance with the usual practice at this stage of the work, the present report focuses on the comments and observations by States and international organizations.[7] The report is not limited to comments and observations that have been received in response to the Commission's request in 2016. It also addresses all the comments and observations made by States and international organizations in the Sixth Committee of the General Assembly between 2013 and 2016, when considering the annual reports of the Commission. Some 32 States made comments in the Sixth Committee debate in 2013, 27 States made comments in 2014, 25 States made comments in 2015 and 35 States made comments in 2016.

5. The comments and observations that have been received in response to the Commission's request in 2016 are contained in document A/CN.4/712. Since this document could not be issued before the submission of the present report, these comments and observations are quoted in the following form: "[Name of State] 2018, p. X". Previous comments and observations made orally at the Sixth Committee of the General Assembly are quoted from the respective summary records of the relevant

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[1] See *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 239.

[2] *Yearbook ... 2008*, vol. II (Part Two), annex I; *Yearbook ... 2009*, vol. II (Part Two), chap. XII; *Yearbook ... 2010*, vol. II (Part Two), chap. X; and *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. XI.

[3] A/CN.4/660, A/CN.4/671, A/CN.4/683 and A/CN.4/694, respectively.

[4] See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 38–39; ibid., *Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 75–76; ibid., *Seventieth Session, Supplement No. 10* (A/70/10), paras. 128–129; and ibid., *Seventy-first Session, Supplement No. 10* (A/71/10), paras. 75–76.

[5] *See Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), paras. 17 and 73.

[6] Belarus, Czech Republic, El Salvador, Germany, Sweden (on behalf of the Nordic countries, Denmark, Finland, Iceland, Norway and Sweden), Spain, United Kingdom of Great Britain and Northern Ireland and the United States of America; any other written comments that are received after the submission of the present report will be considered by the Commission during its seventieth session.

[7] In the following, the expression "Comments and observations by States" includes comments and observations by international organizations.

meetings. The Special Rapporteur expresses his gratitude to the Secretariat for preparing an analytical table of the comments and observations by Governments and international organizations made in the Sixth Committee of the General Assembly during the work of the Commission on the topic from 2013 to 2016.[8]

6. The present report is structured as follows: after summarizing and assessing general comments and observations on the topic (chap. II), specific comments and observations regarding individual draft conclusions are presented and considered in sequence, followed by a recommendation of the Special Rapporteur for each draft conclusion (chap. III). The report concludes with a recommendation of the Special Rapporteur regarding the final form of the draft conclusions (chap. IV). The annex contains the draft conclusions adopted on first reading in 2016, with the changes recommended by the Special Rapporteur.

II. General comments on the draft conclusions

7. The work of the Commission on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" has, over the years, received general support from States.[9] Many States have expressed their support for the outcome of the work on the topic, sometimes in general terms[10] sometimes when referring to specific draft conclusions.[11] States have emphasized, for example, "the importance of subsequent practice for the purpose of treaty interpretation",[12] the fact that "the topic ... touched on a critical aspect of the work of international jurists",[13] that "the outcome of the Commission's work on the topic would make a major contribution to international law"[14] and that it will "aid international jurisprudence and assist domestic courts".[15]

8. States have, in particular, acknowledged that the purpose of the draft conclusions is to give practical guidance for the interpretation of treaties,[16] while

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[8] The Special Rapporteur is grateful to Mr. David Nanopoulos, Mr. Bart Smit-Duijzentkunst, and Mr. Lukas Willmer; as a general rule, the comments and observations are quoted, first, according to the year of their submission (in reverse chronological order) and, second, according to the sequence in which they appear in the document(s) from which they are quoted.

[9] See the various topical summaries of the discussions held in the Sixth Committee (A/CN.4/666, paras. 4–9; A/CN.4/678, paras. 20–26; A/CN.4/689, paras. 38–51; and A/CN.4/703, paras. 95-103).

[10] See Germany 2018, p. 1; Spain 2018, p. 1; United Kingdom 2018, p. 1; United States 2018, p. 1; A/C.6/71/SR.23, para. 43 (Egypt); A/C.6/71/SR.25, para. 97 (Chile); A/C.6/69/SR.23, para. 90 (El Salvador); A/C.6/69/SR.25, para. 14 (Viet Nam); A/C.6/68/SR.17, para. 32 (Norway, on behalf of the Nordic countries); ibid., para. 89 (Portugal); ibid., para. 122 (France); and A/C.6/68/SR.18, para. 38 (South Africa).

[11] See A/C.6/71/SR.22, para. 76 (Argentina); A/C.6/69/SR.21, para. 32 (New Zealand); A/C.6/69/SR.22, para. 12 (Denmark, on behalf of the Nordic countries); A/C.6/69/SR.23, para. 56 (Poland); A/C.6/69/SR.24, para. 47 (Chile); ibid., para. 72 (Portugal); A/C.6/68/SR.19, para. 1 (Italy); and, ibid., para. 62 (Indonesia).

[12] See A/C.6/68/SR.17, para. 89 (Portugal). See also Sweden (on behalf of the Nordic countries) 2018, p. 1.

[13] See A/C.6/68/SR.18, para. 38 (South Africa).

[14] See A/C.6/71/SR.25, para. 97 (Chile).

[15] Germany 2018, p. 1.

[16] See Czech Republic 2018, p. 1; A/C.6/70/SR.22, para. 35 (New Zealand); A/C.6/70/SR.23, para. 58 (Republic of Korea); A/C.6/69/SR.24, para. 85 (Greece); A/C.6/68/SR 18, para. 74 (Slovakia); and A/C.6/68/SR.19, para. 11 (Poland).

confirming that the present draft conclusions and their commentaries do so.[17] States have also highlighted that the work needs to be based on the applicable rules of the Vienna Convention on the Law of Treaties, which the draft conclusions should clarify and support, but which the Commission should not attempt to change.[18] States have confirmed that the work of the Commission has remained within this framework.[19]

9. It has occasionally been noted that the draft conclusions "were at times too general" and that: "They should be more precise and should include sufficient normative content."[20] Other States, however, expressed the view that the draft conclusions "seemed to meet the general aim of providing sufficient normative content while also preserving the flexibility inherent in the concept of subsequent practice".[21] The Special Rapporteur considers that the general nature of the draft conclusions does not prevent the desirable normative content of the work for the purpose of practical guidance since "the draft conclusions are to be read together with the commentaries".[22] States have expressed their appreciation for the "rich and thoughtful analysis" contained in the commentaries.[23] The general agreement of States on the balance that the Commission has struck between the text of the draft conclusions and the commentaries does not imply that changes should not be made to the latter if necessary[24] or that elements thereof be moved, on second reading, to the text of the draft conclusions or vice versa.[25]

10. Certain States continued to express an interest in a draft conclusion specifically addressing the decisions of domestic courts.[26] In his fourth report, the Special Rapporteur proposed a draft conclusion on the role of domestic courts[27] but the Commission considered, after a full debate on the matter, that it would be preferable to simply add the relevant sources and considerations from that report to the commentaries of the existing conclusions, where appropriate. The commentaries have been supplemented accordingly. The Special Rapporteur considers that this dimension

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[17] See A/C.6/71/SR.21, para. 96 (Portugal); A/C.6/69/SR.21, para. 129 (Russian Federation); A/C.6/69/SR.23, para. 31 (United Kingdom); ibid., para. 47 (Netherlands); A/C.6/68/SR.18, para. 13 (United Kingdom); ibid., para. 69 (Germany); and A/C.6/68/SR.19, para. 80 (Australia).

[18] See A/C.6/71/SR.20, para. 70 (China); A/C.6/70/SR.23, para. 68 (Islamic Republic of Iran); A/C.6/69/SR.24, para. 8 (South Africa); ibid., para. 60 (United States); A/C.6/69/SR.24, para. 74 (Portugal); A/C.6/68/SR.17, para. 42 (United States); ibid., para. 91 (Portugal); A/C.6/68/SR.18, para. 14 (United Kingdom); ibid., para. 39 (South Africa); ibid., para. 87 (Greece); A/C.6/68/SR.19, para. 28 (Cuba); ibid., para. 52 (Russian Federation); ibid., para. 77 (Mongolia); but see A/C.6/68/SR.18, para. 30 (Netherlands).

[19] See A/C.6/71/SR.21, para. 96 (Portugal); A/C.6/69/SR.24, para. 8 (South Africa); A/C.6/68/SR.17, para. 42 (United States); and A/C.6/68/SR.18, para. 39 (South Africa).

[20] See A/C.6/68/SR.17, para. 134 (Spain). See also Belarus 2018, p. 7; Czech Republic 2018, p. 2; and A/C.6/69/SR.24, para. 20 (Spain).

[21] See A/C.6/68/SR.19, para. 1 (Italy); similarly A/C.6/68/SR.17, para. 89 (Portugal). See also A/C.6/68/SR.19, para. 62 (Indonesia).

[22] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), p. 124, para. 76, footnote 388; this point could be emphasized more clearly by moving it from the footnote to the text of the commentary.

[23] See A/C.6/68/SR.18, para. 29 (Netherlands). See also United Kingdom 2018, p. 1; A/C.6/69/SR.23, para. 31 (United Kingdom); ibid., para. 47 (Netherlands); ibid., para. 65 (Singapore); and A/C.6/68/SR.18, para. 13 (United Kingdom).

[24] United States 2018, p. 1.

[25] See Czech Republic 2018, p. 2; United Kingdom 2018, p. 1; and A/C.6/69/SR.24, para. 61 (United States).

[26] See Germany 2018, p. 3; A/C.6/71/SR.21, para. 78 (Austria); ibid., para. 120 (Germany); and A/C.6/71/SR.22, para. 28 (Mexico).

[27] See A/CN.4/694, pp. 36–44, specifically at para. 112.

of the topic has thus been sufficiently taken into account and that it would not be useful to reopen the debate on the matter.

11. The Republic of Korea has remarked that the work of the Commission on this topic should be coherent with its work on other topics, in particular with the topics "Identification of customary international law" and "Protection of persons in the event of disasters".[28] The Special Rapporteur believes that this is the case.

12. Finally, the Special Rapporteur would like to express his gratitude to all States and international organizations that have made comments and observations. As the report will show, these comments are all to the point and well thought-out, which will prove very useful to the Commission when working on the final output on the topic during the seventieth session.

13. Before moving to the comments of States on individual draft conclusions, the Special Rapporteur recommends reading individual comments against the background of the broad agreement among States regarding individual draft conclusions and the draft conclusions as a whole.

III. Comments and observations by States on individual draft conclusions

A. Draft conclusion 1 [1a] — Introduction

The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.

1. Comments and observations by States

14. Draft conclusion 1 [1a] has attracted only a few comments and observations. While France and the Czech Republic agreed with the statement in the commentary according to which treaties between States and international organizations are not dealt with specifically by the draft conclusions,[29] Romania remarked that "some consideration should be given to those aspects as well".[30]

15. The Czech Republic and Malaysia proposed to explicitly state in the draft conclusion, and not only in the commentary, that the topic did not address all conceivable circumstances.[31] Draft conclusion 1 [1a], however, is introductory in nature. The Commission usually formulates short introductory draft provisions. The Special Rapporteur considers that it would overburden unnecessarily the draft conclusion if this element of the current commentary were added to the draft conclusion.

16. The European Union proposed to add to the commentary of draft conclusion 1 [1a] that the draft conclusions elucidated the rules contained in articles 31 and 32 of the Vienna Convention as customary international law.[32] This point, however, is

[28] See A/C.6/70/SR.23, para. 60 (Republic of Korea).

[29] See Czech Republic 2018, pp. 2–3; A/C.6/71/SR.20, para. 73 (France); and A/C.6/71/SR.21, para. 10 (Czech Republic).

[30] See A/C.6/71/SR.21, para. 64 (Romania).

[31] See Czech Republic 2018, p. 2; and A/C.6/71/SR.22, para. 72 (Malaysia).

[32] See A/C.6/71/SR.20, para. 47 (European Union, on behalf of its member States, and Bosnia and Herzegovina, Georgia, Serbia and Ukraine).

expressly stated in draft conclusion 2 [1], paragraph 1, second sentence, and therefore does not seem to be necessary here.

2. Recommendation of the Special Rapporteur

17. No change to draft conclusion 1 [1a] is recommended.

B. Draft conclusion 2 [1] — General rule and means of treaty interpretation

> 1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law.
>
> 2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.
>
> 3. Article 31, paragraph 3, provides, inter alia, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.
>
> 4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.
>
> 5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

1. Comments and observations by States

18. Draft conclusion 2 [1] has received general support from States:[33]

Paragraph 1

19. States have expressed their support for the first sentence of paragraph 1 on the relationship between articles 31 and 32, including for the distinction between subsequent practice under article 31 and other subsequent practice under article 32. This distinction is implied in paragraph 1 of draft conclusion 2 [1] and further explained in the commentary.[34]

20. States have also expressed support for the second sentence of paragraph 1 on the customary nature of the rules contained in articles 31 and 32 of the Vienna Convention.[35] The United Kingdom of Great Britain and Northern Ireland proposed

[33] With the exception of the Czech Republic 2018, pp. 3–4, which has expressed difficulties with the "overall structure" of the text.

[34] See A/C.6/68/SR.18, para. 24 (Peru); ibid., para. 39 (South Africa); ibid., para. 69 (Germany); ibid., para. 88 (Greece); ibid., para. 110 (Romania); ibid., para. 119 (Ireland); A/C.6/68/SR.19, para. 1 (Italy); and, ibid., para. 62 (Indonesia).

[35] See A/C.6/69/SR.24, para. 8 (South Africa); A/C.6/68/SR.17, para. 126 (Mexico); ibid., para. 135 (Spain); A/C.6/68/SR.18, para. 15 (United Kingdom); ibid., para. 24 (Peru); ibid., para. 110 (Romania); ibid., para. 117 (Ireland); and A/C.6/68/SR.19, para. 17 (India). However, see Czech

that the commentary should reflect more clearly that the rules on interpretation applied, as a matter of customary international law, to treaties that predate the Vienna Convention.[36] This can be done.

Paragraphs 2 and 3

21. States have equally agreed with the restatement of the rules of the Vienna Convention in paragraphs 2 and 3 of draft conclusion 2 [1].[37]

22. The United Kingdom has, however, proposed to delete the reference to article 31, paragraph 1, of the Vienna Convention as this might lead "readers that are unfamiliar with the law to an incorrect understanding that treaty interpretation starts with an analysis as to the object and purpose of a treaty".[38] The Special Rapporteur notes that the Commission has included paragraph 2 of draft conclusion 2 [1] in order to make it clear that subsequent agreements and subsequent practice can only play a role as a means of interpretation in the framework of article 31 as a whole, starting with paragraph 1 of article 31 (which mentions the "object and purpose" only after the "ordinary meaning to be given to the terms" and the "context" of the treaty), and concluding with paragraph 5 according to which interpretation is a "single combined operation" under articles 31 and 32. The deletion of paragraph 2 would therefore not lead to a clarification, but would rather risk that readers that are unfamiliar with the law could overemphasize the role and weight of subsequent agreements and subsequent practice as a means of interpretation.

Paragraph 4

23. States have expressed general support for paragraph 4, which clarifies that recourse may be had, as a supplementary means of interpretation, to other subsequent practice in the application of the treaty.[39]

24. Since the term "subsequent practice" is not expressly mentioned in article 32 of the Vienna Convention, Spain proposed to revise the Spanish translation of the reference to subsequent practice under article 32 in different draft conclusions by replacing the words "en el sentido" by the words "en virtud del".[40] This proposal is sensible.

Paragraph 5

25. Finally, States have welcomed paragraph 5 on interpretation being a "single combined operation".[41] The United Kingdom suggested "to elaborate further on the

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Republic 2018, p. 4, proposing to "address this issue only in the commentary", and A/C.6/68/SR.17, para. 118 (France).

[36] See A/C.6/68/SR.18, para. 15 (United Kingdom).

[37] See A/C.6/71/SR.21, para. 142 (Sudan); A/C.6/68/SR.17, para. 126 (Mexico); A/C.6/68/SR.18, para. 88 (Greece); ibid., para. 117 (Ireland); A/C.6/68/SR.19, para. 34 (Malaysia); and A/C.6/68/SR.18, para. 2 (Belarus), which, however, questioned the need to repeat parts of article 31 word for word. See also Belarus 2018, p. 7.

[38] United Kingdom 2018, p. 2.

[39] See A/C.6/71/SR.23, paras. 16–17 (Islamic Republic of Iran); A/C.6/68/SR.17, para. 126 (Mexico); A/C.6/68/SR.18, para. 13 (United Kingdom); ibid., para. 92 (Greece); and, ibid., para. 119 (Ireland). See, in addition, those States that have expressed support for draft conclusion 4, paragraph 3, which implies support for draft conclusion 2, paragraph 4, at footnote 73, below. Two States expressed certain doubts without questioning the paragraph as such (A/C.6/68/SR.17, para. 118 (France); and A/C.6/68/SR.18, para. 4 (Belarus)).

[40] See Spain 2018, p. 2; and A/C.6/70/SR.22, para. 97 (Spain).

[41] See United Kingdom 2018, p. 2; A/C.6/68/SR.18, para. 15 (United Kingdom); ibid., para. 104

meaning of the word 'appropriate' used in subparagraph 5, perhaps by reference to the factors set out in draft conclusion 9".[42] The Special Rapporteur considers that such elaboration should be done in the commentaries and he is open to including a reference to draft conclusion 9 [8] in this context.

26. The only question with respect to which States have expressed different views was whether the draft conclusion, or the commentary, should refer to the "nature of the treaty" as a factor that would typically be relevant for determining whether more or less weight should be given to certain means of interpretation. As was the case within the Commission,[43] some States were in favour of recognizing the possibility that the nature of the treaty could be relevant for the purpose of interpretation,[44] whereas other States preferred to "avoid any categorization" for that purpose.[45] Under these circumstances, it seems preferable that the Commission also does not refer to the "nature of the treaty" in the text of the draft conclusion, but only to the discussion of this possibility in the commentary. In this context, the Czech Republic raised the question "whether and, if so, in which cases, a more pronounced distinction should be made in the formulation of conclusions concerning bilateral and multilateral treaties".[46] The Commission, however, considered the matter on the basis of the Special Rapporteur's first report, according to which the relevance of the distinction between bilateral and multilateral treaties could not clearly be confirmed for the purpose of this topic,[47] and decided not to emphasize this distinction in the text of the draft conclusion.

2. Recommendation of the Special Rapporteur

27. No change to draft conclusion 2 [1] is recommended, except to replace the words "en el sentido" by the words "en virtud del" in the Spanish version.[48]

C. Draft conclusion 3 [2] — Subsequent agreements and subsequent practice as authentic means of interpretation

Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

1. Comments and observations by States

28. Draft conclusion 3 [2] has also received general support. States have, in particular, generally expressed agreement with the formulations in the draft

(Republic of Korea); ibid., para. 110 (Romania); ibid., para. 117 (Ireland); A/C.6/68/SR.19, para. 1 (Italy); and, ibid., para. 62 (Indonesia).

[42] United Kingdom 2018, p. 2.

[43] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), pp. 131–132, at para. (16).

[44] See Belarus 2018, p. 6; A/C.6/68/SR.18, para. 24 (Peru); ibid., para. 110 (Romania); A/C.6/68/SR.19, para. 18 (India); and Belarus 2018, p. 7 and A/C.6/68/SR.18, para. 2 (Belarus), expressing an interest in exploring the possibility.

[45] See A/C.6/71/SR.21, para. 65 (Romania); A/C.6/68/SR.18, para. 117 (Ireland); and A/C.6/68/SR.19, para. 12 (Poland).

[46] See Czech Republic 2018, p. 2. See also A/C.6/68/SR.17, para. 134 (Spain).

[47] See A/CN.4/660, para. 52.

[48] See para. 24 above.

conclusion according to which subsequent agreements and subsequent practice of the parties are "objective evidence" of the understanding of the parties[49] and that they are an "authentic means of interpretation",[50] and have thus endorsed draft conclusion 3 [2].[51]

29. France, however, did not consider the term "objective evidence" to be appropriate, given that States' interpretation of a treaty might evolve.[52] This concern does not seem to take into account that the "terms of the treaty" are also "objective evidence" and that their interpretation may also evolve. The United Kingdom suggested that the term "authentic means of interpretation" might not be appropriate since the term "authentic" was often used when referring to different language versions of treaties.[53] The Commission has, however, already used the term "authentic" in the sense in which it is used here in its 1966 commentary to its draft articles on the law of treaties.[54]

30. Most States agreed with the statement in the commentary to draft conclusion 3 [2][55] that the characterization of subsequent agreements and subsequent practice of the parties does not imply that these means of interpretation necessarily possess a conclusive, or legally binding, effect.[56] Poland, however, found it "difficult to agree" that a subsequent agreement was not necessarily binding,[57] while other States proposed that the matter should be further clarified.[58] The proposition that agreements under article 31, paragraph 3, are not necessarily binding is directly addressed in draft conclusion 10 [9], paragraph 1, second sentence, and is accordingly dealt with in this context.

31. In sum, States generally agreed with the text of draft conclusion 3 [2] as it stands, and most States agreed with its commentary.

2. Recommendation of the Special Rapporteur

32. No change to draft conclusion 3 [2] is recommended.

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[49] See A/C.6/68/SR.18, para. 42 (South Africa); ibid., para. 75 (Slovakia); ibid., para. 118 (Ireland); and A/C.6/68/SR.19, para. 2 (Italy).

[50] See A/C.6/71/SR.22, para. 78 (Argentina); A/C.6/68/SR.18, para. 75 (Slovakia); ibid., para. 105 (Republic of Korea); ibid., para. 119 (Ireland); A/C.6/68/SR.19, para. 2 (Italy); ibid., para. 17 (India); ibid., para. 23 (Thailand); and although it agrees with the content of the draft conclusion, Spain (2018, p. 1) has, however, expressed the view that the characterization "authentic means of interpretation" does not confer "any additional value".

[51] See also Belarus 2018, p. 6; Spain 2018, p. 1; and A/C.6/68/SR.17, para. 136 (Spain); but see Czech Republic 2018, p. 5.

[52] See A/C.6/68/SR.17, para. 119 (France).

[53] See A/C.6/68/SR.18, para. 16 (United Kingdom).

[54] See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, para. (14) of the commentary to art. 27, p. 221.

[55] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), p. 133, at para. (4).

[56] See United Kingdom 2018, p. 2; United States 2018, p. 2; A/C.6/68/SR.17, para. 126 (Mexico); A/C.6/68/SR.18, para. 4 (Belarus); A/C.6/68/SR.19, para. 17 (India). See also A/C.6/71/SR.21, para. 33 (El Salvador); A/C.6/69/SR.22, para. 19 (Austria); A/C.6/69/SR.23, para. 31 (United Kingdom); A/C.6/69/SR.24, para. 89 (Greece); and A/C.6/68/SR.17, para. 63 (Austria).

[57] See A/C.6/68/SR.19, para. 12 (Poland). See also A/C.6/68/SR.18, para. 90 (Greece).

[58] See A/C.6/69/SR.24, para. 21 (Spain); ibid., para. 89 (Greece); A/C.6/68/SR.17, para. 119 (France); and A/C.6/68/SR.18, para. 89 (Greece).

D. Draft conclusion 4 — Definition of subsequent agreement and subsequent practice

1. A "subsequent agreement" as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A "subsequent practice" as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. Other "subsequent practice" as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

1. Comments and observations by States

33. States have generally agreed with draft conclusion 4[59] and have limited their comments to certain specific observations and suggestions.

Paragraph 1

34. Austria noted that paragraph 1 of draft conclusion 4 "should specify that a 'subsequent agreement' did not have to be a treaty within the meaning of the Vienna Convention", but could also be an informal agreement and a non-binding arrangement.[60] The United Kingdom even proposed to include in the definition of "subsequent agreement" that such an agreement does not need to be legally binding, as this "might assist users ... that are unfamiliar with the details".[61] Since, however, draft conclusion 10 [9], paragraph 1, says so explicitly, and since definitions should not be overburdened, the Special Rapporteur considers that the reference to the said draft conclusion in the commentary to draft conclusion 4 is sufficient.

35. Whereas Mexico welcomed that paragraph 1 clarified that interpretation and application should be in relation to the provisions of the treaty,[62] Belarus noted that "a direct reference to the fact that [the subsequent agreement] concerned the interpretation of a treaty was not essential".[63] Austria proposed that the guidelines of the Commission on reservations to treaties, which dealt with interpretative declarations, should be harmonized with the present work.[64] A reference to this work of the Commission could indeed be included in the commentary, confirming that it is in conformity with the present draft conclusions and the commentaries thereto.

36. The United States of America expressed doubts about whether paragraphs 8 to 11 of the commentary were supported by one of the cases cited and proposed changes

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[59] See Sweden (on behalf of the Nordic countries), 2018, p. 1; A/C.6/71/SR.22, para. 78 (Argentina); A/C.6/68/SR.18, para. 44 (South Africa); ibid., para. 75 (Slovakia); ibid., para. 119 (Ireland); and A/C.6/68/SR.19, para. 2 (Italy).

[60] See A/C.6/68/SR.17, para. 63 (Austria). See also A/C.6/68/SR.19, para. 23 (Thailand).

[61] United Kingdom 2018, p. 2.

[62] See A/C.6/68/SR.17, para. 129 (Mexico).

[63] See A/C.6/71/SR.23, para. 5 (Belarus). See also Belarus 2018, p. 7.

[64] See A/C.6/68/SR.17, para. 63 (Austria).

to the commentary.[65] The Special Rapporteur considers that the case cited is pertinent, but he is open to clarify the commentary.

Paragraph 2

37. Concerning paragraph 2 of draft conclusion 4, several States expressed their agreement with that paragraph generally and with specific elements.[66] France, however, questioned whether the term "conduct" was appropriate since a State's "conduct" was not necessarily consistent and continuous but might also be variable and contradictory.[67] The Special Rapporteur accepts that a State's conduct is not necessarily consistent, but consistency is neither implied in the term "conduct", nor is it a requirement for the term "practice". The consistency of individual acts of practice only becomes relevant when determining the interpretative weight of practice (see draft conclusion 9 [8], paragraph 2).[68]

38. The United Kingdom proposed to delete the indefinite article "a" at the beginning of paragraph 2 because the wording "a subsequent practice" would imply "that practice is a single event, as opposed to a course of practice".[69] The Special Rapporteur is not persuaded that the indefinite article "a" actually implies that practice is a single event. In fact, the definition itself and the commentaries make it clear that subsequent practice under article 31, paragraph 3 (b), must consist of a combination of different instances of practice. He would, however, not oppose the deletion of the indefinite article at the beginning of the paragraph. The United Kingdom also suggested that the word "all" be added to paragraph 2, "to make clear that the agreement of 'all' of the parties is required".[70] The Special Rapporteur considers that the expression "the parties" makes it sufficiently clear, as in paragraph 1, that the agreement of all parties is required, and this is confirmed and elaborated upon in the commentary.

39. The United States remarked that paragraph 20 of the commentary would erroneously state that article 31, paragraph 3 (b), required that the subsequent practice of the parties in the application of a treaty must be "regarding its interpretation".[71] The Special Rapporteur considers that the commentary is in conformity with article 31, paragraph 3 (b), and that the comment by the United States makes a distinction that is not contained in the provision. The substantive point that is addressed by the comment, namely that a "State's application of a treaty may reflect a view as to the State's interpretation of a treaty provision, even when that practice does not involve a specific articulation of the interpretation in question",[72] is a matter addressed under draft conclusion 10 [9] below.

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[65] United States 2018, pp. 2–3.

[66] See A/C.6/68/SR.17, para. 32 (Norway, on behalf of the Nordic countries); ibid., para. 129 (Mexico) (practice in the application of a treaty also involves an interpretation); ibid., para. 130 (Mexico) (practice must not necessarily be that of the parties); A/C.6/68/SR.18, para. 17 (United Kingdom) and ibid., para. 61 (Hungary) (recognition of the practical impact of subsequent practice before the entry into force of the treaty); and, ibid., para. 92 (Greece) (distinction between subsequent practice as an authentic means of interpretation and "other subsequent practice" as a supplementary means of interpretation).

[67] See A/C.6/68/SR.17, para. 121 (France). See also A/C.6/68/SR.19, para. 24 (Thailand).

[68] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), commentary to draft conclusion 9 [8], pp. 190–191, paras. 6–11.

[69] United Kingdom 2018, p. 2.

[70] Ibid., p. 3.

[71] United States 2018, pp. 3–4.

[72] Ibid., p. 4.

Paragraph 3

40. Turning to paragraph 3 of draft conclusion 4, most States expressed their support.[73] Some States asked for further clarification,[74] which will be provided in the commentary. Poland proposed to replace the expression "one or more parties" by "one or some parties" in order to ensure that the provision would not be construed as referring to the practice of all parties.[75] While this proposal would indeed exclude the possibility that "other subsequent practice" could be understood as referring to all parties, it risks giving rise to the misunderstanding that "some parties" can only be a small number of parties, which is not the intention. The Special Rapporteur therefore considers that this point should be clarified further in the commentary.

41. The Czech Republic proposed to move the inverted commas around "subsequent practice" so as to indicate clearly that the term to be defined was "other subsequent practice".[76] The Special Rapporteur agrees with this technical correction.

2. Recommendation of the Special Rapporteur

42. No change to draft conclusion 4 is recommended (except the technical correction to have the inverted commas in paragraph 3 put around "other subsequent practice").

E. Draft conclusion 5 — Attribution of subsequent practice

> 1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.
>
> 2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

1. Comments and observations by States

43. States agreed with the general approach of the Commission in draft conclusion 5, according to which only the practice of States parties to a treaty constitutes subsequent practice under articles 31 and 32, and that the practice of other actors can merely play an indirect role as a means of interpretation for the treaty, if at all.[77] Some States did, however, raise certain specific questions regarding draft conclusion 5.

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[73] See A/C.6/68/SR.17, para. 64 (Austria); ibid., para. 130 (Mexico); A/C.6/68/SR.18, para. 61 (Hungary); ibid., para. 92 (Greece); and, ibid., para. 119 (Ireland).

[74] See A/C.6/71/SR.22, para. 78 (Argentina); A/C.6/68/SR.18, para. 76 (Slovakia); and A/C.6/68/SR.19, para. 35 (Malaysia).

[75] See A/C.6/68/SR.19, para. 12 (Poland).

[76] Czech Republic 2018, p. 6.

[77] See A/C.6/71/SR.23, para. 22 (Cuba); A/C.6/68/SR.17, para. 89 (Portugal); ibid., para. 122 (France); A/C.6/68/SR.18, para. 7 (Belarus); ibid., para. 45 (South Africa); A/C.6/68/SR.18, para. 94 (Greece); ibid., para. 106 (Republic of Korea); ibid., para. 119 (Ireland); A/C.6/68/SR.19, para. 24 (Thailand); ibid., para. 35 (Malaysia); ibid., para. 40 (Israel); ibid., para. 53 (Russian Federation); ibid., para. 65 (Indonesia); and, ibid., paras. 72–73 (Islamic Republic of Iran).

Paragraph 1

44. The general thrust of paragraph 1 of draft conclusion 5 has been supported by almost all States that have specifically referred to it.[78]

45. The United States, however, proposed that the language of draft conclusion 5 be reconsidered since, "[i]n reality, there were many acts, for example the actions of a State agent taken contrary to instructions, that were attributable to a State for the purposes of State responsibility but were not considered State practice for the purposes of the interpretation of treaties".[79] This observation is undoubtedly true and its underlying concern should be addressed. The concern is closely connected with another aspect of paragraph 1, which is the possible relevance of the practice of lower and local authorities. In this respect, Ireland agreed with the Commission, as expressed in the commentary to draft conclusion 5, that "the practice of lower and local officials may be subsequent practice 'in the application of the treaty' if this practice is sufficiently unequivocal and if the Government can be expected to be aware of this practice and has not contradicted it within a reasonable time".[80] This formulation implies that it is not sufficient for the practice of lower officials to count as subsequent practice in treaty interpretation, if such practice is attributable under the rules of State responsibility. Responsibility under the rules of State responsibility may arise irrespective of whether the Government is or may be aware of it.

46. For these reasons, the Special Rapporteur recommends that the Commission reformulate paragraph 1 so as to make it clearer that not every conduct that may be attributed to a State under the rules of State responsibility is sufficient to count as subsequent practice for the purpose of treaty interpretation. It is possible to achieve this goal without changing too much of the existing language by moving the words "in the application of a treaty" to the end of the sentence and formulating as follows: " ... may consist of any conduct which is attributable to a party to the treaty under international law and is in the application of the treaty". The commentary would then make it clear that attributability under the rules of State responsibility is a necessary but not a sufficient condition, and thus that the conduct must, in addition, be undertaken in a recognized application of a treaty. Such recognition will mostly be implied in the jurisdiction (or competence) of the acting State organ, or in an authorization of other actors by the State. The commentary would also make it clear that the reference in paragraph 1 to practice that is attributable to States is not intended to limit "the flexibility currently exercised by international courts and tribunals in interpreting treaty terms".[81]

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[78] See Germany 2018, p. 1; A/C.6/68/SR.18, para. 106 (Republic of Korea); ibid., para. 119 (Ireland); A/C.6/68/SR.19, para. 35 (Malaysia); ibid., para. 40 (Israel); ibid., para. 53 (Russian Federation); A/C.6/68/SR.18, para. 94 (Greece); in this sense, see also A/C.6/71/SR.23, para. 22 (Cuba); and A/C.6/68/SR.17, para. 117 (France); but see Czech Republic 2018, p. 6, seeing "no need to deal with 'attribution' of the conduct in the application of a treaty to a party".

[79] See A/C.6/71/SR.20, para. 62 (United States). In this context, the United States has expressed the view that the judgment of the International Court of Justice in the *Kasikili Sedudu Island* case does not support the draft conclusion, as indicated in the commentary, because the Court ultimately concluded that there had been no relevant subsequent practice under article 31, paragraph 3 (b); see United States 2018, p. 4. The commentary does not, however, rely on the ultimate result of the Court judgment but on its reasoning, which is quoted in full in the commentary. See similarly Czech Republic 2018, p. 6; and A/C.6/68/SR.19, para. 3 (Italy).

[80] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), p. 151, para. (7); see A/C.6/68/SR.17, para. 139 (Spain); A/C.6/68/SR.18, para. 6 (Belarus); and, ibid., para. 26 (Peru).

[81] See A/C.6/68/SR.18, para. 119 (Ireland).

Paragraph 2

47. Regarding paragraph 2 of draft conclusion 5, most States accepted its basic approach, some suggesting more cautionary language in the commentary in order to make it even clearer that the conduct of non-State actors cannot, as such, be relevant for the interpretation of a treaty.[82]

48. The United Kingdom, however, proposed to use more restrictive wording,[83] and Greece suggested to refer to conduct by non-State actors only in the commentary.[84] The Islamic Republic of Iran cautioned that the Commission should not create "confusion about the role that such [non-State] actors could play in the formation of customary international law" and not risk to overstep its mandate.[85] Such reservations and concerns, however, while understandable, do not require a reformulation of paragraph 2. They have also been addressed in the work of the Commission on the topic of "Identification of customary international law",[86] to which reference will be made in the commentary, and they can otherwise be addressed in the commentary.

49. Some States have emphasized the distinct character of the practice of international organizations in contrast to the conduct of private non-State actors.[87] It is true that international organizations play distinct roles in international law, including for the purpose of the interpretation of certain treaties. After adopting draft conclusion 5, the Commission recognized this fact in respect of constituent instruments of international organizations by adopting draft conclusion 12 [11]. However, given the fact that the present draft conclusions are based on the Vienna Convention (which applies to treaties between States, including to constituent instruments of international organizations) and do not deal specifically with treaties between States and international organizations and between international organizations, it appears reasonable to put the practice of actors that are not States (parties) into a common separate category. This does not exclude referring to draft conclusion 12 [11] in the commentary to draft conclusion 5. It should be noted that this is without prejudice to any other possible effects of the practice of international organizations.

50. Finally, Mexico has expressed an interest in the Commission addressing the role of adjudicatory bodies as evidence for the formation of subsequent practice of States,[88] while the Republic of Korea stressed that interpretations of treaties by dispute settlement bodies do not as such constitute subsequent practice under the

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[82] See Germany 2018, p. 2; United States 2018, pp. 5–6; A/C.6/68/SR.17, para. 122 (France); A/C.6/68/SR.18, para. 45 (South Africa); A/C.6/68/SR.19, para. 24 (Thailand); ibid., para. 35 (Malaysia); ibid., para. 40 (Israel); and, ibid., para. 65 (Indonesia). See also A/C.6/69/SR.21, para. 119 (Belarus), stating that the practice of non-State actors could not be used for the purposes of identifying subsequent agreements and subsequent practice in the context of draft conclusion 6.

[83] United Kingdom 2018, p. 3: "Such conduct may, however, provide ancillary evidence to demonstrate subsequent practice by a party or itself generate or give rise to subsequent practice by a treaty party." See also A/C.6/68/SR.19, para. 53 (Russian Federation).

[84] See A/C.6/68/SR.18, para. 94 (Greece).

[85] See A/C.6/68/SR.19, para. 72 (Islamic Republic of Iran).

[86] See draft conclusion 4, paragraph 3, on identification of customary international law, *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), p. 76.

[87] See Germany 2018, p. 3; A/C.6/68/SR.17, para. 90 (Portugal); and A/C.6/68/SR.19, para. 4 (Italy). See also A/C.6/70/SR.20, para. 38 (Austria).

[88] See A/C.6/68/SR.17, para. 131 (Mexico).

Vienna Convention.[89] It is true that the commentary to draft conclusion 5 only addresses dispute settlement bodies in a cursory manner. The Special Rapporteur considers that judicial pronouncements, while being in principle able to give rise to or reflect subsequent practice by the parties to a treaty, produce specific legal effects, including more or less authoritative interpretations of a treaty. Such effects need not, however, be addressed in the context of the work on the present topic.

2. Recommendation of the Special Rapporteur

51. The Special Rapporteur recommends reformulating paragraph 1 of draft conclusion 5 so that it would read:

> "Subsequent practice under articles 31 and 32 may consist of any conduct which is attributable to a party to the treaty under international law and is in the application of the treaty."

F. Draft conclusion 6 — Identification of subsequent agreement and subsequent practice

> 1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).
>
> 2. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms.
>
> 3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

1. Comments and observations by States

52. Draft conclusion 6 received relatively few comments and observations from States, most of which were supportive.[90] Some States noted that the draft conclusion could be more precise.[91]

Paragraph 1

53. Two proposals have been made relating to the second sentence of paragraph 1 of the draft conclusion.

54. Belarus proposed to move the explanation in the commentary of the term "*modus vivendi*" ("a temporary and exceptional measure that left the general treaty obligation unchanged") to the text of the draft conclusion.[92] This explanation,

[89] See A/C.6/68/SR.18, para. 106 (Republic of Korea); but see A/C.6/68/SR.17, para. 89 (Portugal): "subsequent practice of many different international judicial or quasi-judicial bodies").

[90] See A/C.6/69/SR.21, para. 118 (Belarus); A/C.6/69/SR.23, para. 31 (United Kingdom); A/C.6/69/SR.24, para. 9 (South Africa); ibid., para. 28 (Malaysia); ibid., para. 86 (Greece); and A/C.6/69/SR.25, para. 25 (Republic of Korea).

[91] See Czech Republic 2018, pp. 7–8; A/C.6/71/SR.22, para. 78 (Argentina); and A/C.6/69/SR.24, para. 20 (Spain).

[92] See Belarus 2018, p. 6; A/C.6/71/SR.23, para. 5 (Belarus). See also A/C.6/71/SR.23, para. 22 (Cuba).

however, only applies to the example given in the commentary and it is too narrow when considering other examples. The Special Rapporteur therefore suggests that the commentary offer one or two more examples, as proposed by Greece,[93] in order to illustrate the term "*modus vivendi*" more clearly.

55. Ireland proposed to insert the words "for example" after the words "this is not normally the case" as this would make the illustrative nature of the text clearer.[94] This proposal is sensible. It would, however, entail the removal of the word "normally".

56. Regarding the commentary, the United Kingdom proposed "to include an explanation as to the distinction between agreements that establish practical arrangements and agreements that provide for substantive interpretation".[95] The United States suggested to refine and update two references in footnote 603 (para. (17)).[96] The commentary may indeed be further elaborated to that effect.

Paragraph 2

57. The United Kingdom proposed to move paragraph 2 so as to become paragraph 1, so that "those unfamiliar with the law might first understand the basic principle, and that they can then move on to understand further details".[97] The Special Rapporteur considers that paragraph 2 is not so much a basic principle but rather serves to facilitate the identification of subsequent agreements and subsequent practice in the light of the criteria contained in paragraph 1. This explains the sequence of the paragraphs, which should therefore remain unchanged.

58. The Islamic Republic of Iran noted that "internal conduct such as official legislative acts or judicial decisions would have to be specifically linked to the application of the treaty in order to merit consideration as subsequent practice".[98] However, given the diversity of the ways in which different kinds of treaties are applied, the Special Rapporteur would prefer not to formulate strict conditions in the commentary.

Paragraph 3

59. States generally agreed with paragraph 3 of draft conclusion 6.[99] Japan, however, noted that the distinction between subsequent practice under article 31, paragraph 3 (b), and that under article 32 should be clearly explained.[100] This is done in the commentary to draft conclusion 4, paragraph 3.

2. Recommendation of the Special Rapporteur

60. The Special Rapporteur recommends that the word "normally" be removed and be replaced by "always", and that the words "for example" be inserted after the words "this is not always the case", so that the second sentence of paragraph 1 would read:

[93] See A/C.6/69/SR.24, para. 86 (Greece).
[94] See A/C.6/69/SR.24, para. 43 (Ireland); in this sense, see also A/C.6/69/SR.24, para. 86 (Greece).
[95] United Kingdom 2018, p. 3.
[96] United States 2018, pp. 6–7.
[97] United Kingdom 2018, p. 4.
[98] See A/C.6/69/SR.24, para. 80 (Islamic Republic of Iran).
[99] See A/C.6/69/SR.23, para. 57 (Poland); and A/C.6/69/SR.24, para. 72 (Portugal).
[100] See A/C.6/69/SR.23, para. 71 (Japan). See also A/C.6/69/SR.24, para. 21 (Spain).

"This is not always the case, for example if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*)."

G. Draft conclusion 7 — Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

1. Comments and observations by States

61. Most comments and observations by States regarding draft conclusion 7 concerned paragraph 3 thereof.

Paragraphs 1 and 2

62. Paragraphs 1 and 2 met with the approbation of those States that referred to them.[101]

63. The United Kingdom proposed to add the words "by confirming the interpretation that has been reached under Conclusion 7 (1)" at the end of paragraph 2 in order to "reflect the scheme of articles 31 and 32 of the Vienna Convention".[102] Spain was concerned that the term "clarify" might not cover the possible effect of article 32 of "confirming" the meaning of the treaty.[103] The Special Rapporteur considers that the general reference to article 32 (which contains an explicit reference to article 31) is sufficient. This reference prevents unnecessary duplication and avoids that one of the elements of article 32 is emphasized over another without an apparent reason. The term "clarify" covers all possible effects of article 32. This is confirmed in the commentary[104] and could be made even clearer there, if necessary.

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[101] See A/C.6/69/SR.21, para. 130 (Russian Federation); and A/C.6/69/SR.23, para. 58 (Poland). The Czech Republic 2018 (2018, p. 7), however, considered paragraphs 1 and 2 to be "superfluous".

[102] United Kingdom 2018, p. 4.

[103] Spain 2018, p. 1.

[104] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), p. 171, para. (15).

Paragraph 3

64. Paragraph 3 addresses the difficult question of the relationship between an interpretation and an amendment or modification of a treaty, including the possible role that subsequent agreements and subsequent practice may play in this context. The three sentences in paragraph 3 are interrelated. The commentary offers a variety of sources and describes the different points of view that have existed among States at least since the elaboration of the Vienna Convention. It also offers an explanation for the language chosen in paragraph 3.

65. Not surprisingly, in their comments and observations, States continue to express different views regarding the general question of whether the subsequent practice of the parties can lead to the modification of a treaty.[105] It was indeed precisely because the Commission was aware of this long-standing divergence of views among States and courts that it chose the language that is used in paragraph 3. This language expresses the widest possible agreement between States and gives a nuanced answer to the question posed. Paragraph 3 offers a general direction without fully resolving the question for all conceivable circumstances. The approach of the Commission in this regard has been generally accepted in the sense, as Chile has put it, that "draft conclusion 7, paragraph 3, concerning interpretation versus modification or amendment, was an acceptable approach to a matter that had initially given rise to divergent opinions".[106]

66. In particular, States that have commented on the first sentence of paragraph 3 have expressed agreement with the "presumption of interpretation" as formulated therein.[107] Concerning the second sentence, according to which "[t]he possibility of amending or modifying a treaty by subsequent practice of the parties has not generally been recognized", many States have made general statements regarding this possibility, but no State has expressed the view that this second sentence was not acceptable.[108] It is true that Romania and Italy have proposed to delete the sentence in order to give more room for the possibility of amending or modifying a treaty by

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[105] The following States have expressed themselves in favour of a broad approach: A/C.6/71/SR.22, para. 77 (Argentina); A/C.6/69/SR.22, para. 18 (Austria); ibid., para. 42 (Romania); ibid., para. 47 (Italy); A/C.6/69/SR.23, para. 37 (Germany); A/C.6/69/SR.24, para. 43 (Ireland); and A/C.6/69/SR.25, para. 25 (Republic of Korea). The following States have advocated a restrictive approach: A/C.6/71/SR.20, para. 70 (China); A/C.6/71/SR.22, para. 45 (Thailand); A/C.6/69/SR.21, para. 131 (Russian Federation); A/C.6/69/SR.23, para. 72 (Japan); ibid., para. 90 (El Salvador); A/C.6/69/SR.24, para. 22 (Spain); ibid., para. 29 (Malaysia); ibid., para. 47 (Chile); and A/C.6/69/SR.25, para. 15 (Viet Nam). Among those States, the position of Chile regarding the jurisprudence of the International Court of Justice is addressed in the commentary, see *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), p. 176, para. (27), footnote 684.

[106] See A/C.6/71/SR.25, para. 97 (Chile); similarly Belarus 2018, p. 6.

[107] See A/C.6/71/SR.22, para. 52 (Viet Nam); A/C.6/69/SR.22, para. 18 (Austria); ibid., para. 32 (France); A/C.6/69/SR.23, para. 37 (Germany); ibid., para. 47 (Netherlands); ibid., para. 58 (Poland); and A/C.6/69/SR.24, para. 87 (Greece). However, see Czech Republic 2018, p. 8.

[108] See A/C.6/71/SR.20, para. 70 (China); A/C.6/71/SR.22, para. 45 (Thailand); A/C.6/69/SR.21, para. 131 (Russian Federation); A/C.6/69/SR.22, para. 18 (Austria); A/C.6/69/SR.23, para. 72 (Japan); ibid., para. 90 (El Salvador); A/C.6/69/SR.24, para. 22 (Spain); ibid., para. 29 (Malaysia); ibid., para. 47 (Chile); A/C.6/69/SR.25, para. 15 (Viet Nam); ibid., para. 25 (Republic of Korea). See also A/C.6/71/SR.22, para. 45 (Thailand) and A/C.6/69/SR.24, para. 29 (Malaysia). The statements of Thailand and Malaysia can be understood as excluding the possibility of a modification of a treaty by the subsequent practice of the parties, which would be consistent with the second sentence of paragraph 3.

the subsequent practice of the parties.[109] Most States have, however, either explicitly agreed with that sentence or have expressed a restrictive or a negative attitude towards the possibility of modifying a treaty by the subsequent practice of the parties.[110] Under these circumstances, the Special Rapporteur considers that the second sentence should be retained.

67. The third sentence of paragraph 3 (the without prejudice clause) was not separately commented upon by States, except by Greece, which expressed its agreement.[111]

68. The United States suggested that the second sentence in paragraph (24) of the commentary ("International case law and State practice suggest that informal agreements that are alleged to derogate from treaty obligations should be narrowly interpreted") was not sufficiently supported by the references indicated.[112] The Special Rapporteur believes that possible misunderstandings can be prevented by deleting this sentence and moving the references in the footnote, as far as applicable, to the footnotes at the end of the paragraph.

69. Concerning paragraph 3 as a whole, some States suggested that it could be more detailed,[113] in particular that the distinction between interpretation and amendment or modification should be further clarified.[114] Other States, however, agreed with the Commission that the dividing line between interpretation and modification was often "difficult, if not impossible to fix",[115] and agreed with the Commission's resulting cautious approach.[116] The question is whether it would be helpful to transfer elements of the commentary to the text of paragraph 3 of draft conclusion 7. However, the difficulty to determine the line between interpretation and modification in the abstract is the reason why the commentary only offers illustrative examples and does not attempt to formulate a bright-line rule that could become part of the text of the draft conclusion. One possibility to further emphasize the importance of the distinction between interpretation and modification, and to avoid any possible misunderstanding,[117] could be to make the third sentence of paragraph 3 (the without prejudice clause) a separate additional paragraph.

2. Recommendation of the Special Rapporteur

70. No change to draft conclusion 7 is recommended.

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[109] See A/C.6/69/SR.22, para. 42 (Romania); and, ibid., para. 47 (Italy).

[110] See A/C.6/71/SR.20, para. 70 (China); A/C.6/71/SR.22, para. 45 (Thailand); A/C.6/69/SR.21, para. 131 (Russian Federation); A/C.6/69/SR.23, para. 72 (Japan); ibid., para. 90 (El Salvador); A/C.6/69/SR.24, para. 22 (Spain); ibid., para. 29 (Malaysia); ibid., para. 47 (Chile); A/C.6/69/SR.25, para. 15 (Viet Nam); and, ibid., para. 25 (Republic of Korea).

[111] See A/C.6/69/SR.24, para. 87 (Greece).

[112] United States 2018, p. 2.

[113] See A/C.6/69/SR.24, para. 20 (Spain), in this sense see also A/C.6/69/SR.23, para. 90 (El Salvador); and A/C.6/69/SR.24, para. 43 (Ireland).

[114] See A/C.6/69/SR.22, para. 32 (France); and A/C.6/69/SR.24, para. 60 (United States).

[115] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), p. 176, at para. (27). See also A/C.6/69/SR.22, para. 37 (Germany); and A/C.6/69/SR.24, para. 22 (Spain).

[116] See A/C.6/71/SR.22, para. 52 (Viet Nam); A/C.6/69/SR.23, para. 47 (Netherlands); and, ibid., para. 58 (Poland).

[117] See A/C.6/69/SR.22, para. 32 (France); and A/C.6/69/SR.24, para. 60 (United States). See also A/C.6/69/SR.23, para. 72 (Japan).

H. Draft conclusion 8 [3] — Interpretation of treaty terms as capable of evolving over time

> Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

1. Comments and observations by States

71. Draft conclusion 8 [3] on "Interpretation of treaty terms as capable of evolving over time" has received general agreement from States.[118] The few suggestions for improvement do not concern the substance of the draft conclusion.

72. States have in particular agreed with the decision of the Commission, as reflected in draft conclusion 8 [3], that it would not be appropriate to make an abstract doctrinal choice between a contemporaneous and an evolutive approach to interpretation, but rather to leave it to the interpretation of any particular treaty rule whether a contemporaneous or an evolutive interpretation is appropriate.[119] When expressing their support, some States emphasized that caution needed to be exercised when deciding whether an evolutive interpretation was warranted.[120] Other States, while also expressing their support for draft conclusion 8 [3], saw considerable room for such interpretation in certain fields and situations.[121]

73. Some observations by States were made at an early stage and have already been taken into account by the later work of the Commission. This is true, in particular, for the proposal by Greece to move what is now draft conclusion 8 (and which was originally draft conclusion 3) from the "very first set of draft conclusions" to a point further down the list.[122] This has happened by moving the draft conclusion from 3 to 8. The same is true for proposals to explore the relationship between (evolutive) interpretation and modification or amendment[123] — which has now been clarified in draft conclusion 7 and its accompanying commentary.

74. Other comments and observations raised the concern of possible misunderstandings. El Salvador noted, for example, that: "The ability to evolve did not depend only on the willingness of the parties to a treaty; it could derive from the nature of the term or from events occurring during the life of the treaty."[124] While it

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[118] See Belarus 2018, p. 8; A/C.6/71/SR.22, para. 13 (Greece); A/C.6/69/SR.23, para. 91 (El Salvador); A/C.6/68/SR.17, para. 127 (Mexico); ibid., para. 137 (Spain); A/C.6/68/SR.18, para. 5 (Belarus); ibid., para. 17 (United Kingdom); ibid., para. 25 (Peru); ibid., paras. 38 and 43 (South Africa); ibid., para. 60 (Hungary); ibid., para. 93 (Greece); ibid., para. 106 (Republic of Korea); ibid., para. 111 (Romania); A/C.6/68/SR.19, para. 2 (Italy); ibid., para. 24 (Thailand); ibid., para. 28 (Cuba); ibid., para. 53 (Russian Federation); and, ibid., paras. 63–64 (Indonesia).

[119] See Belarus 2018, p. 7; A/C.6/68/SR.17, para. 120 (France); ibid., para. 127 (Mexico); A/C.6/68/SR.18, para. 4 (Belarus); ibid., para. 17 (United Kingdom); ibid., para. 25 (Peru); ibid., para. 43 (South Africa); ibid., para. 111 (Romania); A/C.6/68/SR.19, para. 34 (Malaysia); and A/C.6/71/SR.22, para. 13 (Greece).

[120] See A/C.6/71/SR.22, para. 13 (Greece); A/C.6/68/SR.17, para. 137 (Spain); A/C.6/68/SR.19, para. 34 (Malaysia); ibid., para. 53 (Russian Federation); and, ibid., paras. 63–64 (Indonesia).

[121] See A/C.6/68/SR.18, para. 38 (South Africa); ibid., para. 60 (Hungary); ibid., para. 106 (Republic of Korea); and A/C.6/68/SR.19, para. 28 (Cuba).

[122] See A/C.6/68/SR.18, para. 93 (Greece).

[123] See A/C.6/68/SR.18, para. 5 (Belarus); ibid., para. 43 (South Africa); ibid., para. 93 (Greece); and A/C.6/68/SR.19, para. 18 (India).

[124] See A/C.6/69/SR.23, para. 91 (El Salvador).

is true that the ability of a treaty provision to evolve does not depend only on the willingness of its parties, draft conclusion 8 [3] does not say otherwise. It merely indicates that subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether the meaning of a term is capable of evolving over time. This does not exclude other factors, such as the nature of a term, from also assisting in making such a determination. This is explained in more detail in the commentary, including in the commentary to draft conclusion 2 [1].[125] Similarly, the expression "presumed intention" does not call into question the important purpose of draft conclusion 8 [3], which is to address the question of the choice between a contemporaneous and an evolutive approach to treaty interpretation.[126]

75. Also expressing concern about a possible misunderstanding, the United States stated that the term "presumed intention" "did not seem to capture [the] important distinction" that "[w]hile discerning the intention of the parties was the broad purpose in treaty interpretation ... set forth in articles 31 and 32", this would not be achieved "through an independent inquiry into intention and certainly not into presumed intention".[127] The Special Rapporteur notes that, while it is true that discerning the intention of the parties was the broad purpose in treaty interpretation set forth in articles 31 and 32 and that this cannot be achieved through an independent inquiry into intention, the reason for the choice of the expression "presumed intention" by the Commission was precisely to indicate that any interpretation, including one that gives a term a meaning that is capable of evolving over time, must result from the application of articles 31 and 32 and its means of interpretation. This is explained in the commentary.[128] Under these circumstances, the Special Rapporteur, like most States, does not see a need for further elaborating on the language of draft conclusion 8 [3].

76. Greece remarked that: "Attempts to identify the presumed intention of the parties upon the conclusion of the treaty by applying the various means of interpretation recognized in articles 31 and 32 could lead to misleading conclusions. It would be artificial to conclude that it had been the parties' initial intention to give a term used in a treaty, even a generic one, an evolving meaning, when such an evolution was usually linked to further developments in international law that the parties had not envisaged at the time of the conclusion of the treaty."[129] Here again, it is necessary to distinguish, as explained in the commentary, between the intention in the sense of what the parties actually thought about at the time of the conclusion of the treaty, and the "presumed intention" in the sense of what the parties must have considered to be a possible interpretation of a term, in the application of articles 31

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[125] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), pp. 181 and 183–184, paras. (5), (8) and (9).

[126] See A/C.6/68/SR.17, para. 120 (France).

[127] Ibid., para. 43 (United States). See also United States 2018, p. 7; and Czech Republic 2018, p. 8

[128] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), pp. 183–184, paras. (8) and (9), in particular:

> "Accordingly, draft conclusion 8 [3], by using the phrase 'presumed intention', refers to the intention of the parties as determined through the application of the various means of interpretation that are recognized in articles 31 and 32. The "presumed intention" is thus not a separately identifiable original will .... And although interpretation must seek to identify the intention of the parties, this must be done by the interpreter on the basis of the means of interpretation that are available at the time of the act of interpretation and that include subsequent agreements and subsequent practice of parties to the treaty. The interpreter thus has to answer the question of whether parties can be presumed to have intended, upon the conclusion of the treaty, to give a term used a meaning that is capable of evolving over time."

[129] See A/C.6/68/SR.18, para. 93 (Greece).

and 32, at the time of the conclusion of the treaty (even if they did not have actual knowledge of certain circumstances that only arose later). If the Commission would deem it necessary, this could be further clarified by deleting the words "upon the conclusion of the treaty". Since, however, most States did not see the need to further elaborate on the language of draft conclusion 8 [3],[130] the Special Rapporteur considers that it should remain unchanged.

2. Recommendation of the Special Rapporteur

77. No change to draft conclusion 8 [3] is recommended.

I. Draft conclusion 9 [8] — Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, inter alia, on its clarity and specificity.

2. The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

1. Comments and observations by States

78. Draft conclusion 9 [8] did not receive many comments or observations. Most of those that were received were supportive,[131] some of which contained proposals for further improvement.[132]

General remarks

79. Malaysia remarked, as a general matter, that the useful criteria identified in draft conclusion 9 [8] "should be subject to other rules on treaty interpretation contained in the Vienna Convention, in particular those in article 31, paragraph 1".[133] The Special Rapporteur points out that this is already the case given the explicit reference in draft conclusion 9 [8] to the corresponding rules of the Vienna Convention. It therefore does not need further elaboration. Belarus suggested to emphasize the distinction "between repeated practice as a means of interpreting an international treaty and practice that led to the formation of a norm of customary international law".[134] Whereas this important distinction undoubtedly exists, the Special Rapporteur considers that draft conclusion 9 [8] is not the right place to refer to it.

[130] See footnote 118 above.

[131] See Sweden (on behalf of the Nordic countries) 2018, p. 1; A/C.6/69/SR.22, para. 12 (Denmark, on behalf of the Nordic countries); A/C.6/69/SR.23, para. 60 (Poland); ibid; para. 65 (Singapore); A/C.6/69/SR.24, para. 43 (Ireland); ibid., para. 73 (Portugal); ibid., para. 88 (Greece); and A/C.6/69/SR.25, para. 26 (Republic of Korea).

[132] See El Salvador 2018, p. 1; A/C.6/71/SR.21, para. 32 (El Salvador); A/C.6/69/SR.21, para. 120 (Belarus); ibid., para. 132 (Russian Federation); A/C.6/69/SR.23, para. 31 (United Kingdom); ibid., para. 60 (Poland); and A/C.6/69/SR.24, para. 30 (Malaysia).

[133] See A/C.6/69/SR.24, para. 30 (Malaysia).

[134] See A/C.6/69/SR.21, para. 120 (Belarus). See also Belarus 2018, p. 7; and A/C.6/69/SR.21, para. 132 (Russian Federation).

Being a more general matter, this distinction should be addressed, if necessary, in the commentary to draft conclusion 1 [1a].

80. Poland remarked that the draft conclusion "would be clearer if its first paragraph dealt only with the weight of a subsequent agreement and its second paragraph with that of subsequent practice".[135] To make this additional distinction would, however, require the introduction of repetitive wording in the second paragraph. The Special Rapporteur would not be opposed to reformulating paragraphs 1 and 2 in this sense, but he does not consider it to be necessary.

Paragraphs 1 and 2

81. Paragraphs 1 and 2 of draft conclusion 9 [8] received support, in particular their implication, as explained in the commentary, that a requirement for subsequent practice under article 31, paragraph 3 (b), to be "common, concordant and consistent" would be "overly prescriptive".[136] The Russian Federation exceptionally suggested that "consistent and agreed repeated practice of the parties was not an evaluation criterion but rather the necessary minimum for the recognition of a subsequent practice as an authentic means of interpretation".[137] Since "consistency" and "breadth" of practice were legitimate criteria for its weight, the United Kingdom proposed to include them, as well as "how often and with what precision", as factors in paragraphs 1 or 2.[138] El Salvador also suggested to include "the time when the agreement or practice occurred" and "the emphasis given to it by the parties".[139]

82. The Special Rapporteur is open to the possibility of mentioning the criteria of "consistency" and "breadth" as possible factors in the determination of the weight of subsequent practice in addition to the factors already mentioned.[140] The relevance of these factors follows from the materials in the commentary.[141] Since they can only be relevant for subsequent practice (and not for subsequent agreements), it would be preferable to mention them in paragraph 2 (which refers exclusively to subsequent practice), and not in paragraph 1, which refers to both subsequent agreement and subsequent practice. On the other hand, the Special Rapporteur is less persuaded by the proposal to include "the time when the agreement or practice occurred" and the "emphasis given to it by the parties". These factors cannot easily be confirmed from the available materials. It is also not clear whether older practice has, in itself, less relevance than recent practice, nor is it easy to determine whether the parties have given more or less emphasis to a particular agreement or practice. The Special Rapporteur nevertheless agrees with the observation of Singapore according to which it is conceivable "why a conscious and mindful repetition might generally be perceived as having more weight", and that the Commission should be "reluctant to summarily dismiss or discount the value of technical or unmindful repetitions".[142] The Special Rapporteur is less persuaded by the suggestion of the United Kingdom

[135] See A/C.6/69/SR.23, para. 60 (Poland).

[136] See A/C.6/69/SR.24, para. 43 (Ireland). See also A/C.6/69/SR.22, para. 12 (Denmark, on behalf of the Nordic countries); and A/C.6/69/SR.23, para. 60 (Poland).

[137] See A/C.6/69/SR.21, para. 132 (Russian Federation). See also A/C.6/69/SR.24, para. 88 (Greece).

[138] See United Kingdom 2018, p. 4; and A/C.6/69/SR.23, para. 31 (United Kingdom).

[139] See El Salvador 2018, p. 1 (referring to the practice subsequent to the General Peace Treaty between El Salvador and Honduras of 30 October 1980); and A/C.6/71/SR.21, para. 32 (El Salvador).

[140] The criterion "precision" is already covered by the terms "clarity" and "specificity" in paragraph 1.

[141] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), pp. 188–193.

[142] See A/C.6/69/SR.23, para. 65 (Singapore).

that the "divergence of views on whether subsequent practice needs to be repeated" should be reflected in paragraph 2 by replacing the word "depends" by "may depend".[143] As the Commission has indicated in its commentary, the divergence of views is more apparent than real and the requirement of repetition should therefore not be seen as a requirement in all cases of article 31, paragraph 3 (b). The formulation "how it is repeated" should be read as implying that repetition is a particularly important factor that should normally be present.

Paragraph 3

83. Paragraph 3 of draft conclusion 9 [8] was agreed with when it was referred to.[144]

2. Recommendation of the Special Rapporteur

84. The Special Rapporteur proposes to insert the words "on its consistency, breadth and" in paragraph 2, so that this paragraph would read:

> "The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, on its consistency, breadth and on whether and how it is repeated."

J. Draft conclusion 10 [9] — Agreement of the parties regarding the interpretation of a treaty

> 1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.
>
> 2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

1. Comments and observations by States

85. Most States accepted draft conclusion 10 [9] in substance,[145] although some States made proposals for further improvements or clarification of its text[146] or recommended caution with respect to certain of its elements.[147]

Paragraph 1

[143] Ibid., para. 31 (United Kingdom).

[144] See A/C.6/69/SR.25, para. 26 (Republic of Korea).

[145] See El Salvador 2018, p. 3; A/C.6/71/SR.21, para. 33 (El Salvador); A/C.6/69/SR.21, para. 121 (Belarus); A/C.6/69/SR.22, para. 12 (Denmark, on behalf of the Nordic countries); ibid., para. 19 (Austria); ibid., para. 43 (Romania); A/C.6/69/SR.23, para. 31 (United Kingdom); ibid., para. 60 (Poland); ibid., para. 72 (Japan); A/C.6/69/SR.24, para. 20 (Spain); ibid., para. 43 (Ireland); ibid., para. 62 (United States); ibid., para. 79 (Islamic Republic of Iran); ibid., para. 89 (Greece); and A/C.6/69/SR.25, para. 26 (Republic of Korea). The Czech Republic (2018, p. 10) criticized paragraph 2 as a whole seeing no role for silence in this context.

[146] See A/C.6/71/SR.21, para. 33 (El Salvador); A/C.6/69/SR.21, para. 121 (Belarus); A/C.6/69/SR.23, para. 72 (Japan); A/C.6/69/SR.24, para. 20 (Spain); ibid., para. 30 (Malaysia); ibid., para. 43 (Ireland); ibid., para. 62 (United States); ibid., para. 79 (Islamic Republic of Iran); and, ibid., para. 89 (Greece).

[147] See A/C.6/69/SR.22, para. 19 (Austria); A/C.6/69/SR.23, para. 71 (Japan); A/C.6/69/SR.24, para. 20 (Spain); ibid., para. 30 (Malaysia); ibid., para. 62 (United States); and, ibid., para. 79 (Islamic Republic of Iran).

86. The first sentence of paragraph 1 was generally accepted and received no requests for clarification.[148]

87. The United States, however, considered that the parties need not be " aware of and accept" the required common understanding under article 31, paragraph 3 (b), but that " the parties' parallel practice in implementing a treaty, even if not known to each other, may evidence a common understanding ... within the scope of Vienna Convention Article 31 (3) (b)".[149] Sweden (on behalf of the Nordic States), on the other hand, underline[d] that any agreement under article 31 paragraph 3 (a) and (b) ... requires the awareness and acceptance of the parties".[150] The Special Rapporteur considers that both the 1964 and 1966 commentaries to the original proposal on article 31, paragraph 3 (b),[151] as well as an arguable reading of the judgment of the International Court of Justice in the *Kasikili/Sedudu Island* case[152] support the formulation contained in the first sentence of draft conclusion 10 [9]. This is explained in the commentary, which adds that: "In certain circumstances, the awareness and acceptance of the position of the other party or parties may be assumed, particularly in the case of treaties that are implemented at the national level."[153]

88. The second sentence of paragraph 1 ("Though it shall be taken into account, such an agreement need not be legally binding") was accepted in substance by most States.[154] France, however, questioned this sentence on the ground that "if such an agreement were not legally binding, there would be a risk of purely political acts or decisions being included in that category".[155] However, the second sentence speaks of "such an agreement" and thereby refers to the first sentence, which requires "a common understanding regarding the interpretation of a treaty which the parties are aware of and accept". Such a common understanding cannot be a purely political act.

89. Expressing themselves on the assumption that the second sentence of paragraph 1 is agreeable in substance, some States proposed to clarify or improve its language. Greece suggested that "the distinction between the substance and the form of such an agreement should be more clearly reflected in the text of draft conclusion [10 [9]]".[156] Similarly, El Salvador proposed that "the wording could be improved by referring both to binding agreements and to those which, although not binding, may be taken

[148] See e.g. A/C.6/69/SR.22, para. 12 (Denmark, on behalf of the Nordic countries).

[149] United States 2018, p. 8.

[150] Sweden (on behalf of the Nordic countries) 2018, p. 1.

[151] "[A] ... practice embracing all the parties and showing their common understanding of the meaning of the treaty ... evidences the agreement of the parties as to the interpretation of the treaty and is analogous to an interpretative agreement. For this reason the Commission considered that subsequent practice establishing the common understanding of all the parties regarding the interpretation of a treaty should be included in paragraph 3 [of what became article 31, paragraph 3, of the Vienna Convention] as an authentic means of interpretation alongside interpretative agreements". *Yearbook ... 1964*, vol. II, document A/5809, p. 204, para. (13). See also *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 221–222, para. (15).

[152] The Court required that, for practice to fall under article 31, paragraph 3 (b), the "Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary", *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1094, para. 73.

[153] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), p. 196, at para. (8).

[154] See El Salvador 2018, p. 3; A/C.6/71/SR.21, para. 33 (El Salvador); A/C.6/69/SR.22, para. 19 (Australia); A/C.6/69/SR.23, para. 31 (United Kingdom); A/C.6/69/SR.24, para. 43 (Ireland); and, ibid., para. 89 (Greece).

[155] See A/C.6/69/SR.22, para. 32 (France).

[156] See A/C.6/69/SR.24, para. 89 (Greece).

into account".[157] Finally, Ireland remarked that "through a slight drafting amendment, the meaning of the final sentence might be made clearer. The use of the word 'though' ... might appear to suggest some conditionality or contingency. It would seem that the intent of the sentence, as described in paragraph (9) of the commentary, might be captured by stating, for example, that '[s]uch an agreement need not be legally binding in order for it to be taken into account'."[158]

90. The proposing States themselves consider that these three suggestions are minor and do not concern the substance of the draft conclusion. The Special Rapporteur is of the view that the second sentence of paragraph 1, if read together with the commentary, is sufficiently clear and should not be changed. Only if a formulation could be found that is both generally acceptable and would reflect the concerns of the different proposals might it be advisable to change the formulation. Perhaps the following formulation might be a possibility: "Such an agreement may, but need not necessarily be, legally binding for it to be taken into account."

91. There have also been proposals by the United States regarding the commentaries[159] and by El Salvador regarding the translation into Spanish,[160] which should be addressed at the appropriate stage.

Paragraph 2

92. The second paragraph of draft conclusion 10 [9] was generally accepted.[161] It has, however, led to calls for caution and to a proposal to bring the text closer into line with the commentary.

93. Regarding the first sentence of paragraph 2, the United States remarked that the clarification in the commentary according to which all the parties to a treaty must express their agreement with the interpretation at issue should be provided in the draft conclusion itself.[162] As already stated in connection with draft conclusion 4, the Special Rapporteur considers that the expression "the parties" makes it sufficiently clear that the agreement of all parties is required, and this is confirmed and elaborated upon in the commentary.[163]

94. Whereas Poland and the Republic of Korea have expressed support for the second sentence of paragraph 2 (on the possible role of silence),[164] some other States have advised caution regarding the conditions under which silence can contribute to establishing a common understanding among the parties — without, however, calling paragraph 2 into question in substance.[165] Their concerns appear to be met by the formulation of the draft conclusion itself. Belarus has in particular noted that "it was necessary to provide that a party that accepted a practice by way of silence should be able to obtain information about such practice and its implications for interpretation

[157] See El Salvador 2018, p. 3; and A/C.6/71/SR.21, para. 33 (El Salvador).
[158] See A/C.6/69/SR.24, para. 43 (Ireland).
[159] United States 2018, p. 9 (regarding paras. (4) and (25) of the commentaries).
[160] El Salvador 2018, p. 3: to replace the words "dicho acuerdo no tiene que ser legalmente viculante" by "dicho acuerdo no requiere ser legalmente vinculante".
[161] Only the Czech Republic (2018, p. 10) objected to paragraph 2.
[162] See A/C.6/69/SR.24, para. 62 (United States).
[163] See above at paragraph 38.
[164] See A/C.6/69/SR.23, para. 60 (Poland); and A/C.6/69/SR.25, para. 26 (Republic of Korea).
[165] See A/C.6/69/SR.21, para. 121 (Belarus); A/C.6/69/SR.22, para. 19 (Austria); A/C.6/69/SR.23, para. 72 (Japan); A/C.6/69/SR.24, para. 20 (Spain); ibid., para. 30 (Malaysia); ibid., para. 62 (United States); and, ibid., para. 79 (Islamic Republic of Iran).

and should have the opportunity to contest it".[166] This concern is met by the formulation in paragraph 1 of draft conclusion 10 [9], according to which the parties must be "aware of and accept" the common understanding. Also, the concern of the Islamic Republic of Iran that "silence or inaction could be construed as acceptance of a practice only under certain circumstances"[167] is met by the expression "when the circumstances call for some reaction" in the second sentence of draft conclusion 10 [9], paragraph 2.

95. The Special Rapporteur does not consider it necessary to further clarify in the text of paragraph 2 beyond what is explained in the commentary.[168] This is because the formulation of paragraph 2 is firmly rooted in the long-established terminology of the Commission and of the International Court of Justice, as explained in the commentary.[169]

2. Recommendation of the Special Rapporteur

96. No change to draft conclusion 10 [9] is recommended.

K. Draft conclusion 11 [10] — Decisions adopted within the framework of a Conference of States Parties

1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

[166] See A/C.6/69/SR.21, para. 121 (Belarus). See also Belarus 2018, p. 7.

[167] See A/C.6/69/SR.24, para. 79 (Islamic Republic of Iran).

[168] United Kingdom (2018, p. 5) has proposed to add the word "manifestly" before the phrase "call for some reaction".

[169] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), Chapter VI, pp. 197–201.

1. Comments and observations by States

97. Draft conclusion 11 [10] was generally supported by States, either without any proposals to amend the text[170] or with certain proposals to improve its text or commentary.[171]

98. Greece questioned the need for a separate draft conclusion relating to decisions adopted by a Conference of States Parties without, however, objecting in substance.[172] El Salvador and the Republic of Korea, on the other hand, found the draft conclusion "very useful" and "acknowledged the important role" of conferences of States parties for treaty interpretation.[173]

Paragraph 1

99. No specific comments and observations were made with regard to paragraph 1 of draft conclusion 11 [10].

Paragraph 2

100. Regarding paragraph 2, the United States expressed the concern "that draft conclusion [11 [10]] and its commentary might suggest that the work of such conferences generally involved acts that might constitute subsequent agreements or subsequent practice in the interpretation of a treaty" but that this was "by far the exception" and that, accordingly: "The wording of the draft conclusion should be modified to indicate that such an outcome was neither widespread nor easily demonstrated."[174] The Special Rapporteur, however, notes that the Commission has already taken this concern into account by adding the following final sentence to paragraph 2: "Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing a treaty." The meaning of this sentence has been well understood, as demonstrated, for example, by the proposal of Romania to add the example of the Assembly of States Parties under the statute of the International Criminal Court as "one exception to the generally valid statement in paragraph (31) [now para. (24)] of the commentary to draft conclusion 10 [11] that the legal effect of a resolution of a Conference of States parties was not usually indicated".[175] Ireland proposed to move the final sentence of paragraph 2 to the commentary and thus did not consider it necessary.[176] Under these circumstances, and because it is normally not the function of draft conclusions to indicate the likelihood of their application in practice, the Special Rapporteur is of the view that the concern regarding the limited likelihood that a decision of a Conference of States parties embodies a subsequent agreement under article 31,

[170] See A/C.6/69/SR.22, para. 44 (Romania); A/C.6/69/SR.23, para. 38 (Germany); ibid., para. 60 (Poland); ibid., para. 91 (El Salvador); A/C.6/69/SR.24, para. 10 (South Africa); and A/C.6/69/SR.25, para. 27 (Republic of Korea).

[171] See Czech Republic 2018, p. 12; United States 2018, pp. 9–10; A/C.6/69/SR.21, para. 122 (Belarus); A/C.6/69/SR.23, para. 31 (United Kingdom); ibid., para. 72 (Japan); A/C.6/69/SR.24, para. 43 (Ireland); and, ibid., para. 63 (United States).

[172] See A/C.6/69/SR.24, para. 90 (Greece).

[173] See A/C.6/69/SR.23, para. 91 (El Salvador); and A/C.6/69/SR.25, para. 27 (Republic of Korea), respectively.

[174] See A/C.6/69/SR.24, para. 63 (United States). See also United States 2018, pp. 9–10.

[175] See A/C.6/69/SR.22, para. 44 (Romania).

[176] See A/C.6/69/SR.24, para. 43 (Ireland); the Czech Republic (2018, p. 11) even proposed to delete this sentence.

paragraph 3 (a), or gives rise to subsequent practice under article 31, paragraph 3 (b), is sufficiently met by the last sentence of paragraph 2.

Paragraph 3

101. Concerning paragraph 3, the United States remarked that, for the purposes of the draft conclusion, "it was only the States parties to a treaty that could enter into a subsequent agreement or engage in relevant subsequent practice" and that: "While it was possible for those parties to act through other bodies, such plenary organs of an international organization or a conference of the parties, it was the agreement of all parties to the treaty in question that must be demonstrated."[177] Paragraph 3 clearly expresses this idea. The commentary could address the further question raised by South Africa of whether "the same principles would apply to meetings or large groups of States in other forums".[178] Such meetings would have to be meetings of the States parties to a particular treaty.

102. Most comments and observations regarding paragraph 3 related to the term "consensus" at the end of the sentence. States generally emphasized the importance of determining whether a decision that was adopted by consensus actually amounted to an agreement in substance[179] and noted that "a decision by consensus would [not] necessarily be equated with agreement in substance".[180] This is indeed the main thrust of paragraph 3. It was, however, also suggested by Ireland and the United Kingdom to move the reference to consensus (and thus the last three words of paragraph 3) to the commentary, as this reference was "slightly unclear"[181] or would create "the possibility of misinterpretation".[182] This concern appears to be primarily stylistic. The Special Rapporteur does not think that it justifies removing the most important category in practice from the text of the draft conclusion to the commentary. He is open to accept a more elegant formulation in the text of the draft conclusion, provided that the reference to consensus is kept. One possibility might be to put the words "including by consensus" in brackets and to remove the comma after the words "was adopted". This would make it unmistakably clear that "including by consensus" is an example for the cases "regardless of the form and procedure" and is not meant to designate a form of agreement in substance, or "on the substantive matter",[183] between the parties.

2. Recommendation of the Special Rapporteur

103. No change to draft conclusion 11 [10] is recommended.

104. However, should the Commission consider this to be necessary, the last part of paragraph 3 could read "regardless of the form and the procedure by which the decision was adopted (including by consensus)". Paragraph 3 would then read:

[177] See A/C.6/69/SR.24, para. 64 (United States).
[178] Ibid., para. 10 (South Africa).
[179] See A/C.6/69/SR.23, para. 38 (Germany); ibid., para. 72 (Japan); A/C.6/69/SR.24, para. 30 (Malaysia); and, ibid., para. 81 (Islamic Republic of Iran).
[180] See A/C.6/69/SR.24, para. 30 (Malaysia). See also A/C.6/69/SR.23, para. 72 (Japan); and A/C.6/69/SR.24, para. 81 (Islamic Republic of Iran).
[181] See A/C.6/69/SR.24, para. 43 (Ireland).
[182] See A/C.6/69/SR.23, para. 31 (United Kingdom). See also United States 2018, p. 10.
[183] United States 2018, p. 10.

"A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted (including by consensus)."

L. Draft conclusion 12 [11] — Constituent instruments of international organizations

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

1. Comments and observations by States

105. Draft conclusion 12 [11] has received many detailed comments from States. Accordingly, the following presentation and analysis is divided between (a) comments that are general in nature or concern the text of the draft conclusion itself and (b) comments that are specific or concern the commentary.

(a) General comments, including on the text of the draft conclusion

106. Most States have expressed their support for draft conclusion 12 [11]. Many States agreed with the draft conclusion in general terms,[184] while others have expressed support with certain qualifications, which will be more specifically addressed below.[185]

107. A general comment by some States consisted in stating that the interpretation of a constituent instrument of an international organization could not lead to a modification of such a treaty.[186] This is indeed explicitly stated in draft conclusion 7, paragraph 3, which also applies to constituent instruments of international

[184] See A/C.6/70/SR.20, para. 9 (Sweden, on behalf of the Nordic countries); ibid., para. 34 (Austria); A/C.6/70/SR.21, para. 69 (Poland); A/C.6/70/SR.22, para. 16 (Germany); ibid., para. 23 (Jamaica); ibid., para. 33 (New Zealand); ibid , para. 52 (Australia); ibid., para. 87 (Chile); ibid., para. 113 (Italy); and A/C.6/70/SR.23, para. 38 (United Kingdom).

[185] See e.g. Czech Republic 2018, p. 11; A/C.6/70/SR.21, para. 44 (Netherlands); and A/C.6/70/SR.22, para. 106 (El Salvador).

[186] See A/C.6/70/SR.21, para. 44 (Netherlands); ibid., para. 60 (Singapore); A/C.6/70/SR.22, para. 27 (Jamaica); ibid., para. 33 (New Zealand); ibid., para. 88 (Chile); and A/C.6/70/SR.23, para. 49 (Malaysia).

organizations. The commentary confirms this situation in general language[187] and could be formulated more specifically, if necessary.

Paragraph 1

108. States generally agreed with paragraph 1.[188]

Paragraphs 2 and 3

109. Whereas most States agreed with paragraphs 2 and 3 in substance,[189] a number of States expressed the view that the text of those two paragraphs did not make the difference between, on the one hand, the subsequent practice of the parties to a treaty themselves (addressed in paragraph 2) and the practice of the international organization as such (addressed in paragraph 3) sufficiently clear.[190] Romania and Spain therefore proposed to insert the words "of the parties" after the words "subsequent practice" where they appear in paragraph 2 (twice)[191] as "[t]hat would highlight how ... paragraphs [1 and 2] differed from paragraph 3, whose object was not the subsequent practice of States, but the practice of the international organization as such".[192] The Special Rapporteur considers this to be a useful proposal. It also meets the request of Singapore to distinguish more clearly between subsequent agreements and the subsequent practice of the States parties to a constituent instrument of an international organization themselves, and the practice of an international organization as such.[193] The distinction between paragraphs 2 and 3 could be even further emphasized if the Commission would follow the proposal of Romania to insert, in paragraph 3, the words "as such" after the opening words "Practice of an international organization".[194] The Special Rapporteur, however, considers that such further emphasis is not necessary and could even give rise to misunderstandings if it is read without the commentary.

110. Otherwise, States mostly supported paragraph 3.[195] Some States, however, expressed concern that paragraph 3 might give too much weight to the practice of international organizations as such. Some of this concern was not directed at the text

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[187] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), p. 214, para. 4.

[188] See, in addition to the States mentioned in footnote 184: United States 2018, p. 11; A/C.6/70/SR.22, para. 42 (United States); and A/C.6/70/SR.23, para. 22 (Russian Federation).

[189] See, in addition to the States mentioned in footnote 184: A/C.6/70/SR.20, para. 34 (Austria); A/C.6/70/SR.22, para. 16 (Germany); ibid., paras. 53–54 (Australia); and A/C.6/70/SR.23, para. 59 (Republic of Korea).

[190] See Czech Republic 2018, p. 11; United States 2018, p. 11; A/C.6/70/SR.20, para. 52 (Greece); A/C.6/70/SR.22, para. 54 (Australia); ibid., paras. 96 and 98 (Spain); ibid., para. 114 (Italy); and A/C.6/70/SR.23, para. 22 (Russian Federation). For States pointing to the difficulty of distinguishing in substance, see A/C.6/70/SR.20, para. 61 (Czech Republic); A/C.6/70/SR.21, para. 45 (Netherlands); and A/C.6/70/SR.23, para. 59 (Republic of Korea).

[191] See A/C.6/70/SR.21, para. 80 (Romania). See also Spain 2018, p. 2; A/C.6/70/SR.22, para. 54 (Australia); and, ibid., paras. 96 and 98 (Spain).

[192] See A/C.6/70/SR.22, para. 96 (Spain). See also Spain 2018, p. 2.

[193] See A/C.6/70/SR.21, para. 61 (Singapore).

[194] Ibid., para. 80 (Romania).

[195] See A/C.6/70/SR.20, para. 34 (Austria); ibid., para. 53 (Greece); A/C.6/70/SR.22, para. 16 (Germany); ibid., para. 54 (Australia); and A/C.6/70/SR.23, para. 59 (Republic of Korea).

or at the commentary of paragraph 3,[196] but rather consisted in the recommendation by Greece to state more clearly in the commentary that the practice of an international organization that was not generally accepted by its member States carried less weight than if that were the case.[197] It is precisely the purpose of the words "may contribute", in paragraph 3, to indicate that the weight of the practice of an international organization may vary. It could certainly be stated even more clearly in the commentary that the agreement of the members with such practice is a primary factor for the determination of its weight.[198]

111. The United States and the Russian Federation went a step further by proposing to remove the reference in paragraph 3 of draft conclusion 12 [11] to paragraph 1 of article 31 of the Vienna Convention.[199] The Special Rapporteur considers that the justification provided by the Commission in its commentary is valid and that the reference to paragraph 1 of article 31 is based on key pronouncements in the jurisprudence of the International Court of Justice.[200] Also, Jamaica brought to the attention of the Special Rapporteur that the decision of the Commission to refer to paragraph 1 of article 31 can be seen as being confirmed at the regional level by a judgment of the Caribbean Court of Justice that considered the practice of the Caribbean Community under the Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy of 2001 in connection with its analysis of the object and purpose of the Treaty.[201] The Special Rapporteur therefore considers that the reference in paragraph 3 to paragraph 1 of article 31 of the Vienna Convention should be kept.

Paragraph 4

112. Paragraph 4 of draft conclusion 12 [11] received general support.[202] The proposal of the Czech Republic to merge paragraphs 4 and 1 of draft conclusion 12 [11][203] goes back to the original proposal of the Special Rapporteur.[204] The Commission, however, considered the text of the draft conclusion would be clearer if the two elements remained separate.

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[196] See A/C.6/70/SR.21, para. 34 (Belarus): "His delegation believed that the practice of international organizations should be considered in a restrained manner. The core task was to interpret the practice of States, and it would not be appropriate to pit that practice against that of the international organizations that those States had established." See also Belarus 2018, p. 8.

[197] See A/C.6/70/SR.20, para. 53 (Greece).

[198] See also A/C.6/70/SR.23, para. 68 (Islamic Republic of Iran).

[199] See United States 2018, p. 12; A/C.6/71/SR.20, paras. 60–61 (United States); A/C.6/70/SR.22, paras. 43–44 (United States); and A/C.6/70/SR.23, para. 22 (Russian Federation).

[200] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), pp. 223–226, paras. (27)–(34).

[201] See A/C.6/70/SR.22, paras. 23–26 (Jamaica) pointing to *Shanique Myrie v. Barbados*, Judgment of the Caribbean Court of Justice, [2013] CCJ 3 (OJ), available at: www.caribbeancourtofjustice.org/wp-content/uploads/2013/10/2013-CCJ-3-OJ.pdf.

[202] See A/C.6/70/SR.19, para. 87 (European Union on behalf of its member States, and Armenia, Bosnia and Herzegovina, Georgia, Montenegro, Serbia and the former Yugoslav Republic of Macedonia); A/C.6/70/SR.20, para. 9 (Sweden, on behalf of the Nordic countries); ibid., para. 52 (Greece); A/C.6/70/SR.22, para. 16 (Germany); ibid., para. 115 (Italy); and A/C.6/70/SR.23, para. 59 (Republic of Korea).

[203] See A/C.6/70/SR.20, para. 60 (Czech Republic).

[204] See draft conclusion 11, paragraph 1, as proposed in the third report of the Special Rapporteur (A/CN.4/683), p. 33, para. 86.

(b) Specific comments, including on the commentary of the draft conclusion

113. Some States requested clarification regarding the role of subsequent agreements and subsequent practice, not only with regard to the constituent instruments of international organizations, but also regarding treaties between States and international organizations or between international organizations.[205] Most States, however, agreed with the approach of the Commission to limit the draft conclusions to treaties to which the rules of interpretation of the Vienna Convention would apply, either directly or by way of customary international law, and not to extend the scope of the draft conclusions to treaties that would fall under the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986.[206] Whereas it would certainly be desirable to also clarify the role of subsequent agreements and subsequent practice under the 1986 Vienna Convention, the Special Rapporteur recommends that the Commission maintain its approach of distinguishing between the law between States and the law of international organizations, as it did when working on the two topics that resulted in the two Vienna Conventions of 1969 and 1986 and on its two projects on responsibility of States and international organizations, respectively.

114. Certain comments and observations aimed to clarify certain general questions regarding the law of international organizations. It was, for example, requested by Austria that the Commission should state that the term "international organization" be understood as only referring to intergovernmental organizations, as in article 2 (i) of the 1986 Vienna Convention.[207] Austria also asked for the Commission to recognize that the term "constituent instruments" comprised only treaties, but that international organizations could also be based on constituent instruments other than treaties.[208] Finally, Austria invited the Commission to explain the relationship between "the practice of the international organization" (in the sense of paragraph 2) and the "established practice of the organization" (under article 2, paragraph 1 (j), of the 1986 Vienna Convention).[209] It is true that these questions are significant but they are, in the view of the Special Rapporteur, of a general nature and do not need be more comprehensively addressed and resolved in the context of the present topic.

115. The same is true for proposals to distinguish or elaborate more clearly, in the draft conclusion or in the commentary, between different organs of an international organization,[210] in particular between acts of plenary organs and other organs.[211] Given the diversity of international organizations, the Special Rapporteur considers that any further differentiation may risk to impose the practice and understandings of one type of international organization upon others.

116. El Salvador remarked that it would be useful to include, in the context of draft conclusion 12 [11], an analysis of the question of attribution of conduct to an international organization, in a similar manner to draft conclusion 5, which deals with

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[205] See A/C.6/71/SR.22, para. 76 (Argentina); A/C.6/70/SR.21, para. 61 (Singapore); A/C.6/70/SR.22, para. 107 (El Salvador); and A/C.6/70/SR.23, para. 50 (Malaysia).

[206] See, e.g., A/C.6/71/SR.20, para. 73 (France); A/C.6/71/SR.21, para. 10 (Czech Republic); A/C.6/70/SR.22, para. 113 (Italy); and A/C.6/69/SR.24, para. 64 (United States).

[207] See A/C.6/70/SR.20, para. 35 (Austria).

[208] Ibid.

[209] See A/C.6/70/SR.20, para. 36 (Austria). See also A/C.6/70/SR.20, para. 54 (Greece); A/C.6/70/SR.21, para. 34 (Belarus); A/C.6/70/SR.22, para. 62 (Portugal); and, ibid., para. 114 (Italy).

[210] See A/C.6/70/SR.21, para. 34 (Belarus).

[211] Ibid., para. 61 (Singapore); and A/C.6/70/SR.22, para. 34 (New Zealand).

the attribution of subsequent practice to States.[212] While such an analysis may indeed be useful, it does not seem to be necessary for the purpose of this particular draft conclusion. The Special Rapporteur therefore proposes that a sentence be included in the commentaries according to which the rules on the responsibility of international organizations and the considerations underlying draft conclusion 5 apply *mutatis mutandis*.

117. The problem of how to distinguish between the subsequent practice and agreements of States, on the one hand, and the (subsequent) practice of the international organization, on the other, is a general one and may have to be resolved, as the Czech Republic has put it, on a case-by-case basis in view of a typically "rather complex process within an organization".[213] In this respect, it may be useful, as proposed by the Republic of Korea, to add explanations in the commentary according to which it is necessary to identify the "intention of the States concerned" by undertaking a "comprehensive examination of the content of the decision of the organ and the circumstances in which it was adopted".[214] In this respect, a reference could be made, as suggested by the European Union, to a decision of the European Court of Justice that "stressed the importance of following separate procedures in cases in which it might be necessary to have decisions adopted by both the Union and by its member States in their independent capacity".[215] As stated by Austria, such an explanation could somewhat clarify the relationship between "the role of international organizations as both actors in their own right and as important forums for the collective actions of their members States",[216] on the one hand, and the "views of States as parties" as "primarily" elements in the process of interpretation, on the other.[217]

118. The following specific comments and observations have also been made:

(a) Austria requested that an express reference be made to article IX, paragraph 2, of the Agreement establishing the World Trade Organization, in order to demonstrate "fully the difficulty of reconciling the institutionalized rules of an organization on interpretation with the role of member States as parties to the constituent instrument of an organization in interpreting that instrument".[218] This could indeed be done in paragraph (40) of the commentary to draft conclusion 12 [11];

(b) Romania remarked that the relationship between draft conclusion 12 [11], paragraphs 2 and 3, on the one hand, and draft conclusion 10 [9], paragraph 2, on the relevance of silence should be further explored.[219] The Special Rapporteur considers that this could be done by adding a sentence in paragraph (22) of the commentary referring to a recent judgment of the European Court of Justice in the case *Europäische Schule München*;[220]

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[212] See A/C.6/70/SR.22, para. 106 (El Salvador).

[213] See A/C.6/70/SR.20, paras. 61–62 (Czech Republic); and, similarly, A/C.6/70/SR.21, para. 45 (Netherlands).

[214] See A/C.6/70/SR.23, para. 59 (Republic of Korea).

[215] See A/C.6/70/SR.19, para. 88 (European Union, on behalf of its member States, and Armenia, Bosnia and Herzegovina, Georgia, Montenegro, Serbia and the former Yugoslav Republic of Macedonia).

[216] See A/C.6/70/SR.20, para. 34 (Austria).

[217] See A/C.6/69/SR.21, para. 124 (Belarus).

[218] See A/C.6/70/SR.20, para. 37 (Austria).

[219] See A/C.6/70/SR.21, para. 80 (Romania).

[220] Joined Cases C 464/13 and C 465/13, *Europäische Schule München v. Silvana Oberto and Barbara O'Leary* [2015], available at http://curia.europa.eu/juris/document/document.jsf?text=

(c) The United States "had questions" about the reference in footnote 359 to paragraph (35) to a "constitutional interpretation" in the commentary to draft conclusion 12 [11].[221] This reference is a mere indication of one important position that can be found in the literature, and it is combined with a reference to an alternative view. It should therefore be maintained;

(d) Germany proposed that the commentary to paragraph 4 include, as an example of *lex specialis*, a statement according to which subsequent agreements and subsequent practice do not play a role in the interpretation of the constituent instruments of the European Union (European Union primary law).[222] More specifically, Poland suggested to mention in the commentary that treaty rules may preclude the subsequent practice of the parties from having a modifying effect (as the European Court of Justice has held in its *Defrenne* judgment).[223] Such an addition to the commentary could indeed be made.

2. Recommendation of the Special Rapporteur

119. The Special Rapporteur proposes that the words "of the parties" be inserted after the words "subsequent practice" where they appear in paragraph 2 (twice). Paragraph 2 would then read:

> "Subsequent agreements and subsequent practice of the parties under article 31, paragraph 3, or other subsequent practice of the parties under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument."

120. No other changes are recommended.

M. Draft conclusion 13 [12] — Pronouncements of expert treaty bodies

1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.

2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.

3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or other subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.

&docid=162782&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=59219 (not yet published in *European Court Reports*), at paras. 65–66; this judgment was referred to in A/C.6/70/SR.19, para. 89 (European Union, on behalf of its member States, and Armenia, Bosnia and Herzegovina, Georgia, Montenegro, Serbia and the former Yugoslav Republic of Macedonia).

[221] See A/C.6/70/SR.22, para. 45 (United States); the reference is to *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), p. 101, footnote 359. The same footnote appears in *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), p. 226, footnote 962.

[222] See A/C.6/70/SR.22, para. 16 (Germany).

[223] See A/C.6/69/SR.23, para. 59 (Poland).

4. This draft conclusion is without prejudice to the contribution that a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty.

1. Comments and observations by States

121. Draft conclusion 13 [12] on pronouncements of expert treaty bodies is the outcome of a thorough debate within the Commission. This debate has led to considerable changes to the original proposal of the Special Rapporteur.[224] These changes concerned, in particular, a stronger emphasis on "the applicable rules of the treaty" (in paragraph 2), as well as the withdrawal of the proposal to describe the possible contribution of a pronouncement of an expert treaty body, as such, to the interpretation of a treaty (deletion of a paragraph according to which such pronouncements "may contribute" to the interpretation, and instead the formulation of a new paragraph 4, according to which the draft conclusion "is without prejudice to the contribution that a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty"). This background explains why earlier comments and observations by States have not always been directed at draft conclusion 13 [12] itself, but took a position with respect to the debate within the Commission before the adoption of draft conclusion 13 [12].

General comments

122. Taking this situation into account, draft conclusion 13 [12] found support. Some States accepted draft conclusion 13 [12] as a whole without further qualifications,[225] whereas other States either made general comments regarding the pronouncements of expert treaty bodies (without referring to specific formulations in the draft conclusion) or limited themselves to making comments to individual paragraphs. Some States expressed caution not to overestimate the value of pronouncements of expert treaty bodies for the interpretation of their treaties,[226] and warned that these bodies should not overstep their mandate or attempt to modify or amend the treaty.[227] Several States also emphasized that the pronouncements of expert treaty bodies did not, in and of themselves, constitute or create a subsequent agreement or the subsequent practice of States parties.[228] Some States, on the other hand, "fully endorsed the view ... that the work of the United Nations human rights treaty bodies greatly contributed to the development of international human rights law".[229]

123. It should be noted in this context that, on 4 April 2017, the Chair of the Human Rights Committee, Mr. Yuji Iwasawa, sent a letter to the Chairperson of the Commission for the sixty-eighth session, Mr. Comissario Afonso, in which he

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[224] Fourth report of the Special Rapporteur (A/CN.4/694), p. 36.

[225] See A/C.6/71/SR.21, para. 96 (Portugal); ibid., para. 131 (Netherlands); A/C.6/71/SR.22, para. 27 (Mexico); ibid., para. 66 (New Zealand); in this sense, see also A/C.6/71/SR.24, para. 21 (Council of Europe).

[226] See United States 2018, p. 12; and A/C.6/71/SR.20, para. 70 (China).

[227] See Sweden (on behalf of the Nordic countries) 2018, p. 1; A/C.6/71/SR.20, para. 70 (China); A/C.6/71/SR.22, para. 41 (Singapore); ibid., para. 73 (Malaysia); A/C.6/69/SR.22, para. 12 (Denmark, on behalf of the Nordic countries); and A/C.6/69/SR.24, para. 29 (Malaysia).

[228] See Belarus 2018, p. 8; Sweden (on behalf of the Nordic countries) 2018, p. 1; United States 2018, p. 12; A/C.6/71/SR.20, para. 53 (Finland, on behalf of the Nordic countries); A/C.6/71/SR.21, para. 77 (Austria); A/C.6/71/SR.22, para. 41 (Singapore); ibid., para. 64 (Japan); and A/C.6/70/SR.22, para. 46 (United States).

[229] See A/C.6/70/SR.20, para. 8 (Sweden, on behalf of the Nordic countries). See also Sweden (on behalf of the Nordic countries) 2018, p. 1.

indicated on behalf of the Human Rights Committee that: "While the Committee agrees with the overall view of the first sentence of paragraph 3 of conclusion 13 [12], that pronouncements of expert treaty bodies may give rise to subsequent agreement or subsequent practice by parties, it finds the second sentence that, '[s]ilence by a party shall not be presumed ... to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body', too restrictive."[230] The letter also indicated that: "In the Committee's view, the contribution that pronouncements of expert treaty bodies can have, whether or not they give rise to a subsequent practice by the parties, would merit clearer recognition in the draft conclusions than in the form of a saving clause in paragraph 4 of conclusion 13 [12]." The Chair of the Human Rights Committee also wrote that the Committee would welcome the opportunity to exchange views on the matter. An informal meeting between five members of the Committee and five members of the Commission, from different regional groups respectively, was then arranged and took place on 20 July 2017. This meeting resulted in a fruitful exchange of views, in particular regarding the question whether it was possible and advisable to distinguish, in the context of the present topic, between different forms of pronouncements of the Human Rights Committee (concluding observations on reports by States, Views concerning individual communications and general comments). The questions raised in this context are addressed below.[231]

124. The United States proposed to replace the term "pronouncements" by "views" or "statements" as the term carried with it "an inappropriate implication of authority".[232] Spain, however, specifically stated "that the use of the word 'pronouncements' is correct".[233] In his fourth report, the Special Rapporteur had explained, and the Commission has accepted, that the term "pronouncement" is a generic term that is sufficiently neutral and able to cover all relevant factual and normative assessments of the different kinds of expert treaty bodies and that does not imply that the action of such a body possesses a judicial quality.[234] He therefore considers that the term should be retained.

Paragraph 1

125. Paragraph 1 of draft conclusion 13 [12] did not receive many comments. Most of them signalled agreement.[235]

126. Spain suggested to replace the expression "experts serving in their personal capacity" by "independent experts".[236] When elaborating the definition in paragraph 1, the Commission had considered this question and had come to the conclusion that it should choose the most widely used expression ("experts serving in their personal capacity") and not the term "independent experts" since this term could give rise to the misunderstanding that such experts could not be government officials.[237] Spain also proposed to include a specific draft conclusion on expert treaty bodies under

[230] The letter is on file with the Secretariat.

[231] At paras. 126 and 133–144.

[232] United States 2018, p. 13.

[233] Spain 2018, p. 3.

[234] See A/CN.4/694, p. 8, para. 14.

[235] See A/C.6/71/SR.22, para. 64 (Japan); and, ibid., para. 73 (Malaysia).

[236] See Spain 2018, p. 3; and A/C.6/71/SR.21, para. 112 (Spain).

[237] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), p. 230, para. 3. See also fourth report of the Special Rapporteur (A/CN.4/694), p. 6, at footnote 27.

human rights treaties.[238] The Special Rapporteur does not consider this to be advisable since the draft conclusions are formulated from the perspective of the rules on interpretation of the Vienna Convention, which are general in nature. It is also difficult to see, from the perspective of the general rule of interpretation, why the role of expert treaty bodies under human rights treaties for the interpretation of such treaties should be different from the role of other expert treaty bodies for the interpretation of their respective treaties.

Paragraph 2

127. Paragraph 2 of draft conclusion 13 [12] was accepted by those States that referred to it.[239]

128. The United States proposed to replace the word "rules" (of a treaty) by "terms", as it would otherwise "likely ... be confusing".[240] It is, however, difficult to see why the term "rules" could be confusing in this context. The word "rules" should therefore be retained.

129. The United States also proposed to delete paragraphs (13) to (15) of the commentaries as the examples given would not demonstrate what they claimed.[241] The Special Rapporteur considers that the commentary is phrased in careful language so as to ensure that it does not formulate unfounded claims. If necessary, this question could be considered during the review of the commentaries.

Paragraph 3

130. Most States agreed with the first sentence of paragraph 3, according to which pronouncements of expert treaty bodies "can give rise to" subsequent agreements and subsequent practice under article 31, paragraph 3, of the Vienna Convention.[242] Greece and the United States, however, stressed that this was an "indirect effect on the interpretation of treaties",[243] and that State practice to that effect was not widespread or could be easily established.[244] Some States also agreed with the replacement by the Commission of the word "reflect" (which the Special Rapporteur had originally proposed) with the word "refer to".[245]

131. The Islamic Republic of Iran "could not concur with the Special Rapporteur that a pronouncement of an expert treaty body could give rise to or refer to a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, and even less so, under article 32. Subsequent practice or subsequent agreement referred to the actual practice or agreement of all the States parties to a treaty, and the pronouncements of experts serving in their personal capacity could not be regarded

[238] See A/C.6/71/SR.21, para. 112 (Spain).

[239] See A/C.6/71/SR.20, para. 53 (Finland, on behalf of the Nordic countries); A/C.6/71/SR.22, para. 41 (Singapore); and, ibid., para. 73 (Malaysia).

[240] United States 2018, p. 13.

[241] Ibid., pp. 13–14.

[242] See, in addition to the States quoted in footnote 225, Czech Republic 2018, p. 12; Germany 2018, pp. 2–3; Sweden (on behalf of the Nordic countries) 2018, p. 1; A/C.6/71/SR.20, para. 53 (Finland, on behalf of the Nordic countries); ibid., para. 70 (China); and A/C.6/71/SR.21, para. 113 (Spain). See also A/C.6/71/SR.22, para. 41 (Singapore); and, ibid., para. 64 (Japan).

[243] See A/C.6/71/SR.22, para. 14 (Greece). See also A/C.6/70/SR.22, para. 46 (United States).

[244] See United States 2018, p. 14; A/C.6/71/SR.22, para. 14 (Greece); and, ibid., para. 74 (Malaysia).

[245] See A/C.6/71/SR.20, para. 53 (Finland, on behalf of the Nordic countries); A/C.6/71/SR.22, para. 35 (Ireland); and A/C.6/71/SR.23, para. 13 (Republic of Korea). But see Spain 2018, p. 3.

as such."[246] However, the Commission has established, in draft conclusion 2, paragraph 2, and in draft conclusion 4, paragraph 3, that "other subsequent practice" under article 32 of the Vienna Convention does not require the participation of all States parties to a treaty and that paragraph 3 does not claim that pronouncements of expert treaty bodies constitute (the subsequent) practice of the parties, but only says that they may (indirectly) "give rise to, or refer to" such practice.

132. The United States proposed to insert an additional paragraph 2 *bis*, which would contain the following language from the commentary and would clarify that "the views of an expert treaty body cannot as such constitute a subsequent agreement or subsequent practice under article 31, paragraph 3, because that provision requires that the parties agree or engage in practice that establishes their agreement regarding the interpretation of their treaty".[247] The Special Rapporteur considers that the draft conclusion is sufficiently clear as it stands. It remains to be formulated in the form of a conclusion, not as an explanation ("because ..."). It is the purpose of the commentary to provide such an explanation. The United Kingdom proposed to "expand on subparagraph 3 to make clear that the effect of a pronouncement of an expert treaty body depends on the interpretative impact that is permitted or provided for by a particular treaty".[248] This point is, however, already clearly stated in paragraph 2.

133. The second sentence of paragraph 3, according to which "[s]ilence by a party shall not be presumed to constitute ... accepting an interpretation ... as expressed in a pronouncement of an expert treaty body" was accepted by those States that referred to it.[249] The Special Rapporteur considers that this sentence reflects a broadly based understanding among States regarding the feasibility and desirability, as a general rule, of their reacting to pronouncements of expert treaty bodies. This understanding, as expressed in the second sentence of paragraph 3, does not, however, exclude that certain kinds of pronouncements by specific expert treaty bodies may under certain circumstances be considered as being accepted by States, even if they have not reacted after their adoption.[250] On the basis of this understanding, the Special Rapporteur does not consider that the second sentence of paragraph 3 is "too restrictive".[251] This point could be expressed more clearly in the commentary.

134. Mexico suggested to improve the wording of paragraph 3 by replacing "shall not be presumed to constitute subsequent practice" by "shall not be presumed to constitute its acceptance of a subsequent practice".[252] This proposal is based on the correct identification of a difference between the wording of this sentence and the second sentence in draft conclusion 10 [9], paragraph 2, which reads: "Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction." In order to harmonize and streamline the terminology, the Special Rapporteur proposes that the second sentence of paragraph 3 read:

[246] See A/C.6/71/SR.23, para. 17 (Islamic Republic of Iran).
[247] United States 2018, p. 13.
[248] United Kingdom 2018, p. 5.
[249] See Belarus 2018, p. 8; Czech Republic 2018, p. 12; Sweden (on behalf of the Nordic countries) 2018, p. 2; A/C.6/71/SR.22, paras. 27–28 (Mexico); ibid., para. 35 (Ireland); and, ibid., para. 82 (Sri Lanka).
[250] This may be true for pronouncements that have been circulated as drafts to all States parties and that have been fully discussed by them.
[251] See above at paragraph 123.
[252] See A/C.6/71/SR.22, para. 28 (Mexico).

> "Silence by a party shall not be presumed to constitute its acceptance of subsequent practice by other parties following an interpretation of a treaty as expressed in a pronouncement of an expert treaty body."

135. This formulation would not retain the reference to article 31, paragraph 3 (b), and would replace the word "accepting" with "following". It does not aim at changing the substance of the second sentence of paragraph 3, but follows from the main proposal. The absence of a reference to article 31, paragraph 3 (b), is required because a subsequent practice by States parties that does not establish the agreement of all parties cannot be a practice under article 31, paragraph 3 (b). Moreover, replacing "accepting" by "following" avoids the repetition of versions of acceptance in the paragraph.

136. The proposal by the United Kingdom to replace the word "accepting" with "neither shall it indicate acceptance of"[253] would significantly change the meaning of the sentence by adding an element that is not addressed in the draft conclusion except in the without prejudice clause that is contained in paragraph 4.

Paragraph 4

137. States that specifically referred to paragraph 4 (the without prejudice clause) noted that this clause "left open further discussion of other ways in which a pronouncement by an expert treaty body could contribute to the interpretation of a treaty" and "requested the Commission to re-examine the issue, during the second reading, on the basis of observations of Member States".[254]

138. The without prejudice clause in paragraph 4 is what remains of a more ambitious, but nevertheless modest proposal of the Special Rapporteur, in his fourth report, to acknowledge the significance of pronouncements of expert treaty bodies, as such, along the lines of the finding of the International Court of Justice and according to other authoritative sources.[255] In the *Diallo* case, the International Court of Justice made the following finding in respect of the Human Rights Committee under the International Covenant on Civil and Political Rights:

> "Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of 'General Comments'. Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty."[256]

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[253] United Kingdom 2018, p. 5.

[254] See A/C.6/71/SR.21, para. 119 (Germany). See also Germany 2018, pp. 2–3; and A/C.6/71/SR.23, para. 13 (Republic of Korea).

[255] A/CN.4/694, pp. 9–36, see particularly the proposal to adopt a paragraph 3, as at p. 36.

[256] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 664, para. 66. See also *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10, at p. 27, para. 39; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at pp. 179–181, paras. 109–110, 112, and at pp. 192–193, para. 136, in which the Court referred to various pronouncements of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. See also *Questions*

139. Accordingly, the Special Rapporteur had proposed, in his fourth report, to include the following paragraph in what became draft conclusion 13 [12]:

> "A pronouncement of an expert body, in the application of the treaty under its mandate, may contribute to the interpretation of that treaty when applying articles 31, paragraph 1, and 32."

140. After a debate, the Commission ultimately decided not to retain the proposal of the Special Rapporteur, but adopted the current without prejudice clause in paragraph 4. This was not because members called into question the substantive findings of the International Court of Justice and of the Special Rapporteur, but rather because some members had expressed doubts about whether the pronouncements of expert treaty bodies constituted "practice in the application of the treaty" that would fall within the scope of the topic.

141. The Special Rapporteur proposes that the Commission revisit its decision to replace his original proposal by the current paragraph 4. "Practice in the application of a treaty" is not confined to one particular act on the ground (as, for example, the execution of an order by the police), but often consists of forms of cooperation among different organs within a State in which not every organ has a competence to make a binding decision. Like international organizations, expert treaty bodies have been created by States to act as their agents in the process of ensuring the proper application of treaties. The fact that such expert treaty bodies do not have the final decision-making power, but are merely an advisory element in the process of correctly applying the treaty, does not distinguish them from State organs that are involved in the application of a treaty without having the final decision-making power.

142. It was indeed recognized, for example by the Netherlands, that "a more elaborate discussion of the legal characterization of such practice" (of expert treaty bodies) would have been welcome[257] and that while the "findings of the treaty bodies themselves would not amount to State practice ... they did play a role as subsequent practice in relation to the interpretation of treaties".[258] Sweden (on behalf of the Nordic countries) expressed the view that they can "only be regarded as means of interpretation and their legal weight will depend on their content, quality and legally persuasive character".[259] Whereas a number of States noted that pronouncements of expert treaty bodies did not constitute subsequent State practice as such,[260] even States that consequently argued in favour of a narrow understanding of what constitutes an "application of a treaty", such as France, recognized that it was the function of expert treaty bodies "to interpret the law and ensure that it was applied by States".[261]

143. It would indeed be a very fine line between "application of a treaty" and "ensuring the application of a treaty". Regardless of whether the two can be distinguished at all, both concepts are closely interrelated, and this justifies, in the opinion of the Special Rapporteur, addressing the possible contribution of

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relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422, at pp. 457–458, para. 101, referring to the pronouncements of the Committee against Torture when determining the temporal scope of the Convention against Torture.

[257] See A/C.6/71/SR.21, para. 132 (Netherlands). See also Germany 2018, pp. 2–3.

[258] See A/C.6/71/SR.21, para. 133 (Netherlands).

[259] Sweden (on behalf of the Nordic countries) 2018, p. 1.

[260] See A/C.6/71/SR.21, para. 67 (Romania); ibid., para. 77 (Austria); A/C.6/71/SR.22, para. 14 (Greece); ibid., para. 41 (Singapore); ibid., para. 64 (Japan); ibid., para. 66 (New Zealand); A/C.6/71/SR.23, para. 13 (Republic of Korea); and A/C.6/70/SR.22, para. 46 (United States).

[261] See A/C.6/71/SR.20, para. 73 (France).

pronouncements of expert treaty bodies for the interpretation of treaties in connection with the present topic. This would remain within the limits of the topic, reasonably understood, just as it was correct to consider the practice of an international organization to be within the scope of this topic (see draft conclusion 12 [11], paragraph 3), in the same way as treaties may be relevant for the topic "Identification of customary international law". The Special Rapporteur therefore proposes to recognize the role of expert treaty bodies beyond the current without prejudice clause[262] and to insert the following paragraph between paragraphs 3 and 4:

> "A pronouncement of an expert treaty body, in the interpretation and application of the treaty under its mandate, may contribute to the interpretation of that treaty when applying articles 31, paragraph 1, and 32."

144. This formulation is based on the original proposal of the Special Rapporteur and follows the model of draft conclusion 12 [11], paragraph 3.

2. Recommendation of the Special Rapporteur

145. The Special Rapporteur recommends to change the second sentence of paragraph 3 of draft conclusion 13 [12], so that it would read:

> "Silence by a party shall not be presumed to constitute its acceptance of subsequent practice by other parties following an interpretation of a treaty as expressed in a pronouncement of an expert treaty body."

146. The Special Rapporteur also recommends to insert the following paragraph between paragraphs 3 and 4 of draft conclusion 13 [12]:

> "A pronouncement of an expert treaty body, in the interpretation and application of the treaty under its mandate, may contribute to the interpretation of that treaty when applying articles 31, paragraph 1, and 32."

IV. Final form of the draft conclusions

147. According to article 23 of its statute, it is for the Commission to submit to the General Assembly the result of its final work on a given topic, accompanied by a recommendation regarding the final form it should take. The work on the present topic concerns the legal significance of subsequent agreements and subsequent practice for the interpretation of treaties, as confirmed by the Commission at the outset of the work.[263]

148. The proposed draft conclusions serve to reaffirm and to clarify the law, in particular in relation to articles 31 and 32 of the Vienna Convention. The present draft conclusions are therefore a contribution to the work of codification of international law, without, however, aiming at replacing an existing convention or eventually becoming a convention themselves. The term "conclusions" implies a guiding function and has been generally accepted and used by States as describing the form that the output of the present work should take.

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[262] See A/C.6/71/SR.21, paras. 132–134 (Netherlands); A/C.6/70/SR.20, para. 8 (Sweden, on behalf of the Nordic countries); and A/C.6/69/SR.22, para. 12 (Denmark, on behalf of the Nordic countries).

[263] See *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), p. 121, at p. 124, paras. 238–239.

149. On this basis, the Special Rapporteur proposes that the Commission recommend to the General Assembly:

(a) To take note of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties in a resolution, to annex the conclusions to the resolution, and to encourage their widest possible dissemination;

(b) To commend the conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to interpret treaties.

Annex

Draft conclusions adopted on first reading in 2016, with the changes recommended by the Special Rapporteur

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Part One
Introduction

Conclusion 1 [1a]
Introduction

The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.

Part Two
Basic rules and definitions

Conclusion 2 [1]
General rule and means of treaty interpretation

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law.

2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

3. Article 31, paragraph 3, provides, inter alia, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

Conclusion 3 [2]
Subsequent agreements and subsequent practice as authentic means of interpretation

Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

Conclusion 4
Definition of subsequent agreement and subsequent practice

1. A "subsequent agreement" as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion

of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A "subsequent practice" as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. ~~"~~Other ~~"~~subsequent practice" as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

Conclusion 5
Attribution of subsequent practice

1. Subsequent practice under articles 31 and 32 may consist of any conduct ~~in the application of a treaty~~ which is attributable to a party to the treaty under international law **and is in the application of the treaty**.

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

Part Three
General aspects

Conclusion 6
Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not ~~normally~~ **always** the case, **for example** if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

Conclusion 7
Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to

amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

Conclusion 8 [3]
Interpretation of treaty terms as capable of evolving over time

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

Conclusion 9 [8]
Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, inter alia, on its clarity and specificity.

2. The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, **on its consistency, breadth, and** on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

Conclusion 10 [9]
Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Part Four
Specific aspects

Conclusion 11 [10]
Decisions adopted within the framework of a Conference of States Parties

1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under

article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

Conclusion 12 [11]
Constituent instruments of international organizations

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice **of the parties** under article 31, paragraph 3, or other subsequent practice **of the parties** under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

Conclusion 13 [12]
Pronouncements of expert treaty bodies

1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.

2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.

3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or other subsequent practice under article 32. Silence by a party shall not be presumed to constitute **its acceptance of** subsequent practice **by other parties** ~~under article 31, paragraph 3 (b),~~ **following** ~~accepting~~ an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.

4. **A pronouncement of an expert treaty body, in the interpretation and application of the treaty under its mandate, may contribute to the interpretation of that treaty when applying articles 31, paragraph 1, and 32.**

5 [4]. This draft conclusion is without prejudice to the contribution that a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty.